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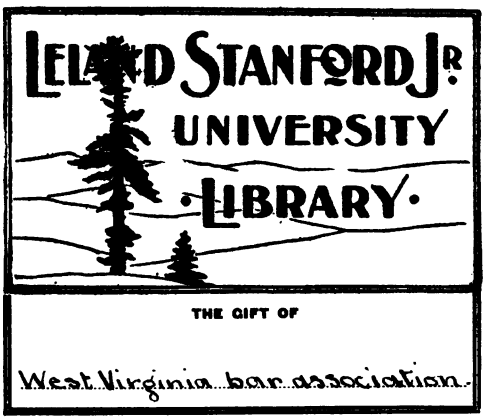
WEST VA. BAR ASSOCIATION

NINETEENTH ANNUAL MEETING

DEC. 30 AND 31, 1903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Proceedings

of the

Nineteenth Annual Meeting

of the

WEST VIRGINIA BAR ASSOCIATION

held at

Parkersburg, West Virginia

on

December 30th and 31st, 1903.

Edited for the Executive Council
by
Nelson C. Hubbard, Secretary.

Wheeling, W. Va.
THE WEST VIRGINIA PRINTING CO.
1904.

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Willis, M. H., West Union.
Woods, Homer B., Harrisville.
Woods, J. Hop., Philippi.
Woods, Sam'l V., Philippi.

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1904.

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TREASURER,

W. N. MILLER,
Parkersburg.

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B. M. AMBLER, Parkersburg.
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C. D. MERRICK, Parkersburg.
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Wesley Mollohan, Charleston.
J. W. Vandervort, Parkersburg.
Robert White, Wheeling.

DELEGATES TO UNIVERSAL CONGRESS OF LAWYERS AND JURISTS.

Henry M. Russell, Wheeling.
Thos. P. Jacobs, New Martinsville.

Nineteenth Annual Meeting

West Virginia Bar Association

Parkersburg

December 30th and 31st, 1903.

FIRST DAY: MORNING SESSION.

The Association met on Wednesday, December 30, at 11 o'clock a. m., in the auditorium of "The Chancellor." Sixty members were present when the Association was called to order by President C. Wood Dailey, of Elkins.

PRESIDENT DAILEY: I am told by the Secretary that the first order of business is the reading of what is called the annual address of the President.

(The President here delivered his address on the subject of "Recent Legislation and Decisions in West Virginia." See Appendix, page 93).

PRESIDENT DAILEY: The next order of business is the report of the Committee on Admissions.

MR. J. HOP WOODS: The chairman of the committee lives in Wheeling and is not here. I believe I am the only member present. There are several applications for membership in the Association which have been presented to me, but I have not had an opportunity yet to confer with any member of the committee who might come in during the session, and I am not yet ready to report upon these applications. It has been suggested by our Secretary if there are no objections to the names proposed, that I simply report them. Here are the applications: S. B. Avis, Charleston; W. G. Mathews, Charleston; W. H. Wolfe, Jr., Parkersburg; A. D. Ireland, Parkersburg; E. M. McPeak, Fayetteville; J. Coleman Simpson, Moundsville; T. C. Cornett, New Martinsville; N. C. Prickett, Ravenswood; Harry H. Byrer, Philippi; John J. Cornwell, Romney; and Jacob Fisher, Sutton. These are the names of the gentlemen who have been proposed, and so far as I know personally they are all proper applications.

PRESIDENT DAILEY: The report of the Committee on Admissions recommends to the members of the Association the gentle-

men whose names have been reported. What is the pleasure of the Association?

MR. J. W. VANDERVORT: I move that the Secretary cast the vote of the Association for the several gentlemen named.

The motion was duly seconded and carried.

The Secretary thereupon announced that he had cast the ballot of the Association as directed, and the persons named in the report of the Committee on Admissions were declared duly elected members of the Association.

PRESIDENT DAILEY: The next order of business is the report of the Secretary.

The Secretary, Mr. Nelson C. Hubbard, presented his report as follows:

SECRETARY'S REPORT.

To the West Virginia Bar Association:

The Secretary reports that the routine duties of his office have been performed, after a fashion, and within his term of one year, during which period no claim can accrue against him.

The report of the eighteenth annual meeting has been prepared and printed, and distributed to the members of the Association and to the State Bar Associations and law libraries named in the mailing list of the Virginia Bar Association.

Notice has been given to the chairman of each standing and special committee, asking that a written report of the proceedings of his committee be submitted; and a like report has been requested from the delegates to the recent meeting of the American Bar Association.

A card was sent to one of our members in each county represented in this Association, asking for the names of the officers of its local bar association, if such existed. From the replies of those who were thoughtful enough to make reply—being twenty-one out of forty-two, a list was prepared and sent to the Secretary of the American Bar Association for publication in his report. The list shows that local organizations exist in Fayette, Lewis, Marion, Marshall, Monongalia, Ohio, Tucker, Upshur, Wetzel and Wood counties—ten out of the fifty-five in the State. The secretary of each of these organizations has been asked to have a meeting held, so that applicants for admission to our membership might be duly qualified.

Four weeks before the present meeting a notice of its time and place was sent to each member, and ten days ago there was mailed to each a printed program and suitable railroad card cer-

tificates which had been obtained at the rate of one and one-third fares for the round trip. Since THE BAR now reaches all our members, the by-laws might well be changed so as to dispense with this formal notice.

The issuance of the last annual report was delayed and rendered difficult and troublesome by matters scarcely to be avoided, due to the present system of distributing the duties of our officers. The Secretary recommends that permanent headquarters of the Association be established at the seat of the State University, and that a person there resident shall be chosen Secretary under an indeterminate sentence, charged with the duty of issuing all printed publications and preserving all records of the Association. His duties should be made more palatable by an annual sweetener such as our Treasurer can well afford to spare.

There should be *one* place to which general correspondence and requests for back publications can be directed, and from which historical or biographical information about the meetings and the members can always be had; and *one* person who will arrange for reporting the meetings, for harmonizing the interests of the annual report and that given in THE BAR, and for printing and binding the report in uniform style. Such a permanent Secretary can perform the duties with a saving of one hundred per cent of nervous energy and vocabulary.

The duties of preparing for the meetings, including all special correspondence as to papers, addresses and committee reports, may well be laid each year upon new and undaunted shoulders; but it is considered that for the proper fulfillment of those duties of which a permanent record is to remain, and those which concern our relations to other bar associations, the Secretary should have the qualifications named, and the tenure of office should continue through life and good behavior. For this reason the Secretary trusts that upon surrendering his share of administrative power and glory to-morrow afternoon the mantle of the succession, no longer rent by the conflicting struggles of a cloud of aspirants, may descend in its completeness upon his present superior officer, the editor of THE BAR.

PRESIDENT DAILEY: What shall be done with the Secretary's report? It will be received and filed if there is no motion in regard to it.

PRESIDENT DAILEY: The next order of business is the Treasurer's report.

The Treasurer, Mr. W. N. Miller, submitted his report, as follows:

TREASURER'S REPORT.

To the West Virginia Bar Association:

Gentlemen: In presenting this, my thirteenth annual report as Treasurer, it is with pleasure I state to you that the finances of the Association are in excellent condition; better than ever before. The responses of the members to the requisitions of the Treasurer for dues to the Association and subscriptions to THE BAR have been prompt and generous.

This report is accompanied by a detailed statement of the receipts and disbursements, with vouchers, for the past year. This statement shows a balance in the general treasury from last year of $1,390.21; receipts during the past year from initiation fees and annual dues, $882.00; making a total of $2,272.21; disbursements during the year have amounted to $278.65. There was a balance to the credit of THE BAR from last year amounting to $41.65; subscriptions to the amount of $222.00 have been collected during the year; making a total of $263.65; disbursements during the year on account of THE BAR amounted to $371.60. The total receipts from all sources for the year amount to $1,104.00, and total disbursements for the year to $650.25, leaving a balance to the credit of the two accounts of $1,885.61, an increase of the total balance over last year of $433.75. There is outstanding and owing for dues to the Association and subscriptions to THE BAR the sum of $878.50. It will be noticed from the amounts given that there has been paid out on account of THE BAR $107.95 more than has been received from subscriptions.

I respectfully ask that the accounts herewith submitted may be audited.

Very respectfully submitted,

W. N. MILLER, Treasurer.

(The detailed statement of the Treasurer's accounts is printed in the January number of THE BAR, pages 4 to 14.)

PRESIDENT DAILEY: What shall be done with the Treasurer's report?

I notice in the by-laws of the Association, tenth section, that "The Treasurer's report shall be examined and audited annually, before its presentation to the Association, by two members to be appointed by the chairman of the Executive Council." I assume that has been done or the Treasurer would not have reported.

TREASURER MILLER: That has not been done and that has not been the practice heretofore, and I would prefer, Mr. President, that you would not assume that.

PRESIDENT DAILEY: I appoint J. Hop Woods and Colonel Robert White to audit the Treasurer's report and submit the result of their work to the Association.

PRESIDENT DAILEY: Passing for the present the report of the Executive Council, the next matter in order is the report of the Committee on Judicial Administration and Legal Reform—Mr. Ambler.

MR. B. MASON AMBLER: I am sorry to say that this is not the report of the committee, but any member who comes in can file a dissenting opinion later. This is to be treated as a main opinion, but there may be a notation at the bottom that the majority do not concur therein.

REPORT OF THE COMMITTEE ON JUDICIAL ADMINISTRATION AND LEGAL REFORM.

To the West Virginia Bar Association:

This committee submits the following report:

1.—*The Judiciary.*

Under the Constitutional Amendment adopted in 1902, with reference to the Judiciary, the Legislature, largely through your influence, at the session of 1903, changed the salaries of judges of the supreme court from $2,200 to $4,200, and of circuit judges from $1,800 to $3,300. During the year 1904, two judges for the supreme bench, and circuit judges throughout the state, are to be elected.

Your committee deems the nomination of these officers to be of highest importance, and urges that the united effort and influence of the profession be concentrated upon the selection of the most competent and best qualified, so that the people at the polls may vote upon men of such integrity and fitness, that confidence in the strength and purity of the judiciary may inspire respect for the law, and maintain an exalted standard of administrative justice as the surest foundation of a well-ordered state.

The public have a right to demand of a profession which enjoys so many privileges, that the ablest and worthiest of its members shall render a cheerful service in this most useful department of the government; while the salaries are now such as to enable the most capable to enter upon this duty at living wages.

Each community can best determine for itself how best to accomplish results, and no fixed rule can apply throughout all the circuits as to methods. But there are some guiding principles applicable to all, among which we suggest:

(1) No man should be nominated unless he is willing to be in fact and in truth a judge, desirous of filling the full measure of duty for his full term, impressed with the dignity and responsibilities of the office, and resolved to devote his time and talents to its requirements. He who aspires to the bench as a resting place, a make shift, or stepping stone, who seeks its patronage as a lever, its power as a perquisite, or its honor as a trophy, or who is after its salary, to shirk its duties, or to deny the fair measure of its performance—any such aspirant should be discouraged from offering himself, denied a nomination or defeated at the polls.

The slothful, the trifling and the unreliable, as well as the unlearned and the corrupt, may still find avenues to the public treasury, but let it not be through the Hall of Justice.

For nearly seventeen centuries Magna Charta has denounced in one sentence the sale, the denial and the delay of justice—corruption, refusal, and procrastination, and each of these evils may be as destructive of the rights of parties as though all had full effect.

(2) Where by prior service efficiency has been demonstrated, it is unwise to make experiments and to lose the experience and administrative qualities that are invaluable.

The greater reflection should be given to this point, for the reason that a model judge is most often assailed by the unscrupulous because he is just, while virtuous citizenship is unaware of the hostility to a faithful minister, and knows not the danger of his overthrow.

(3) No place in secular life tests a man as does the judgeship, in mind and heart, and from so many directions. Every case tries him, and he is beset, directly and indirectly, at every turn. To hold the scales with steady hand, and to remain steadfast amid storm and confusion—always wise, informed, courageous and unerring—would be beyond reasonable expectation; but if a man does not aim to be an exemplar of the ideals of justice, he fails to aim aright at this high calling.

No quantity of votes won by "mixers" will transform a jollier into a judge. In America the real power in state affairs, affecting all the people, is with the judiciary. We are about to determine the personnel of ours for many long, long years; and

now, before the scramble for spoils begins, we should appeal individually and collectively to our fellow-citizens to stand resolute, and insist upon the greatest care in this most vital question.

2—*Rules of Practice.*

The rules of practice in the several circuits of the state are not uniform. In some, the rules on a variety of subjects are in conflict with statutes passed since the rules were promulgated. We are often without guidance: for instance, the time and manner of submitting instructions—the effect of affidavits in chancery—the taking of bills for confessed—the taking of papers by the jury—the effect of pleadings in vacation in injunction cases—are ruled differently, and Mr. Russell has more than once called to our attention that there is no fixed practice regarding taking of testimony in equity.

Is not this state sufficiently homogeneous to justify an attempt at uniformity in practice, and the adoption of fixed regulations? The legislature has covered some such questions, and others may be fixed by statute.

The United States Courts in their equity practice are governed by rules prescribed by the Supreme Court; and by federal statute the practice at law, in federal courts, shall conform to the practice of the state courts in the respective districts, which in our state lacks uniformity in many particulars; but some matters of procedure in this state are covered by no defined rule or regulation.

How can a reasonable degree of uniformity be obtained?

Each circuit judge may promulgate rules for his own circuit, but outside of the legislature there is no power to make any rule for every circuit.

We recommend that a committee be appointed to take this subject into consideration, and frame rules and regulations for practice in the circuit courts.

3—*Stenographers.*

Stenographic work is recognized by statute. That art has made many changes in practical procedure. We cannot fail to note the enormous increase in the volume of records, and the increased cost and expense entailed. In the taking of testimony, short-hand saves much time, but far more words are used than under the old system, more words to be read, to be printed and to be briefed; and each adds to the cost. Moreover, copies can so conveniently be taken when the short-hand notes are type-

written, that in most cases such copies are called for. These records can be manifolded, with a trifle of labor and expense over the taking of the first official copy. Stenographer's fees are said to be untrammeled by statute. In some cases they seem monstrous, and from the very facility of rapid work, they at best add vastly to the cost of litigation, and lay greater labor upon the courts. As a matter of justice to litigants, and to reduce expenses sometimes ruinous to suitors, we ought to get a better and surer basis.

The lawyers themselves should cut out useless questions, and irrelevant matter, and omit ill-considered padding of the record, and where useless matter is introduced under a flagrant abuse of privilege, the courts should charge the offender with the costs of expunging it.

We have known instances where notaries have had the work done by accomplished women, to whom small wages were paid, while the officer charged fees beyond the limit allowed to notaries, on the ground that the officer was a stenographer.

By our Constitution, no woman can be appointed to an office. No woman can be commissioned as notary public. When we go into other states, say New York, Ohio, Pennsylvania, women are official reporters and notaries, and render most efficient service in the taking of testimony. They ought not to be barred from this in West Virginia, and we feel very sure that if women had the official position to work on their own account, as notaries and court reporters, the result would be most beneficial. They actually perform a very large part of that labor.

The way should be opened to give to every expert woman the full opportunity to earn her livelihood at the highest wage she can command, especially in lines where she has demonstrated efficiency so satisfactorily; and this, more than any other step, will bring the question of burdensome expenses to the level of fair compensation all around.

We beg, as an appropriate subject, within our committee, to urge upon the Association, that to the women of West Virginia the position of notary public for the taking of testimony ought to be accorded. We present this not only in the interest of judicial administration, but as a matter of justice to the diligent, deserving class of citizens to whom men profess constant devotion, but with whom they do not always everywhere deal fairly.

If no way can now be devised to commission a woman as notary, cannot the legislature effect the object by authorizing the circuit courts to appoint women duly qualified, as *reporters*, with

authority to administer oaths and to take and certify testimony?

The committee has not obtained requisite data for recommending at this time a fixed scale of fees for short-hand work; but we think the subject is of sufficient importance to call it to the attention of the profession, and we hope later to collate the regulations established in other jurisdictions.

4—*Re-hearings in the Court of Appeals.*

We are often struck by the number of re-hearings pending in our court—out of all proportion to the other four states grouped with ours in the Southeastern Reporter.

It is urged that we should ask a change in the limit of time for applying for a re-hearing, and for withholding decisions on that account. As this time limit has been agitated by the Reporters and among members, and is assigned as a topic on our present programme, we make no recommendation on that branch of the subject; but with utmost respect for the court, and bearing testimony to the hard work of the court, we do venture to suggest that the growing number of re-hearings do not show well for the method of dispatching business. The impression is not rare, that the entire court does not pass upon a case with full deliberation before an opinion is filed; and that the individual expression of an opinion is allowed to pass in the first instance, in expectation that a review may be had. This tendency should be checked, as everything that increases uncertainty impairs reverence for the pronouncements of the court of last resort.

By our Constitution, the supreme court is required to "consider and decide every point fairly arising upon the record, and the reasons therefor shall be concisely stated in writing," and the court shall prepare "a syllabus of the points adjudicated, concurred in by three of the judges."

Not infrequently an opinion is wholly against the decision, with a note that the majority of the court do not agree with its writer; and occasionally we learn that the reasoning of an opinion, concurred in by the whole court, is not a safe precedent, as the court feels bound only by the syllabus. It is sometimes thought that a commendable zeal in disposing of cases deprives the court of opportunities for consultation, and parties of the benefit of deliberation of all the judges upon each case. The increase in number from four to five judges was made to give a larger working force and greater emphasis to decisions; but as long as the impression prevails that an opinion filed is an invitation to get the case considered by the whole court, the applica-

tions for re-hearing will grow in number, this additional burden will be imposed upon the court, and less satisfactory results will be attained.

We have many reasons to commend our supreme court to public respect and honor, but we feel it due to this high tribunal to suggest that some way should be devised to secure consideration of each case by each judge, and that it should appear, when an opinion is filed, how the members stand with regard to it, as concurring or dissenting.

B. M. AMBLER.

PRESIDENT DAILEY: The next matter in order is the report of the Committee on Grievances.

MR. WILLIAM P. HUBBARD: Mr. Chairman, the matters presented by the report to which we have just listened are most of them so vital and important, and deserving of such an extended consideration by the Association, that I do not think they ought to be disposed of—at least if time will permit some discussion of them—with the mere perfunctory action of receiving and filing that report; and if I am in order I would like to say a few words and invite an expression from others rather than make any suggestions myself.

PRESIDENT DAILEY: The gentleman is in order.

MR. WILLIAM P. HUBBARD: I want to say a word as to the rules of practice in the circuit courts. We have all of us felt the difficulties suggested in that report. I imagine that appellate courts are put to some trouble in understanding the proceedings below, arising out of the absence of rules in the lower courts, where rules do exist; and where, as in this state, all counsel must—or almost all of them—practice in more than one circuit, they must be embarrassed to some extent in their practice by a lack of uniformity of rules. But I cannot concur with the suggestion that, desirable as the enactment of those rules is, it is to be reached through the appointment of a committee of this Association. In at least one state of the Union, and perhaps in more, it is the practice for the circuit judges of the state once a year to meet in convention or conference, where matters of practice, as well as other matters of interest to them as judges, are considered and passed upon.

The power that is vested in courts to be exercised by their promulgation of rules, has never, in its exercise, reached anywhere near the limits of that power. And right there rests the possibility of an improvement in the convenience and the expedi-

tion with which the judicial business of the state is to be transacted. It is not to be done by the adoption of the system; it is to be done only by the acts of the men who administer that system, and it seems to me that it would be well for this Association to express to the judges a desire that they would get together—even judges perhaps may learn something from one another, just as I am sure members of this Association learn a great deal from one another—that they would get together and compare views; and from a conference of that sort might result the promulgation of a code of rules uniform throughout the state, exercising somewhat toward the limit the power which the court has, and dealing with those various matters presented in this report.

One thing more: I sympathize most fully, from experience and observation, with what is said toward the conclusion of that report about the evils and inconveniences that have obtained in the transaction of business with the court of appeals. Great as the judicial ability of that body is, and great as it has been, some of us have sometimes felt that in point of executive ability it has not filled the same measure. Recently a change in the practice of that court has obtained, as I am informed, under which, instead of cases being heard orally, or briefs left to pile up and be reached in their turn, or dealt out perhaps in rotation for single judges to write an opinion on, the cases are to be heard singly, almost; that is, on a certain day of the week two or three cases, or perhaps only one, will be called for argument, with the expectation that as soon as that case is argued the court will take it up for consideration, and that a determination of it may be expected at an early day. Now, if that practice which has been so well outlined in the changed method of preparing the docket is carried out, as I have no doubt it will be, I think a good many of these difficulties that have been pointed out by Brother Ambler in his report will disappear. When the court comes to consider that an oral argument is part of the hearing of the case, and not a mere submission which the judges may store away, and go off and forget about, and that the trial of the case is then begun, to be continued until they dispose of the case, and that the five judges of that court will be called on to consider that case and to express an opinion on it and vote upon it *before* one of their number, who is best fitted, by that sort of litigation and for other reasons, to express the views of the court upon that question, will be given an opportunity to do so,—the cases will not then be merely assigned in rotation. You will have a full court, and

decisions which will render it impossible for future Presidents of the Bar Association to entertain us as fully as we have been entertained here this morning.

PRESIDENT DAILEY: Do you make any motion, Mr. Hubbard?

MR. WILLIAM P. HUBBARD: I will move, for the purpose of enlisting the views of the Association, that the judges of the circuit courts be respectfully requested to meet at their convenience, with a view to establishing uniform rules of practice in the circuit courts of the state.

PRESIDENT DAILEY: I do not know whether a motion needs a second in this body or not. I assume it does not. You have all heard the motion—that this Association request the circuit judges throughout the state to meet in conference, at their convenience, and to adopt uniform rules of practice for the circuit courts.

The motion was propounded by the chair and carried.

MR. GEORGE E. PRICE: In so far as the report of the Committee on Judicial Administration and Legal Reform apparently seeks to discourage the filing of petitions for a re-hearing, under the present practice and methods of our court of appeals, I want to dissent from it. I do not think, sir, that any evil comes from the preparation and filing of petitions for re-hearing before our present court of appeals. I do not think it causes any evil results from such practice before any appellate court which is the court of last resort, and whose judgment in a particular case, when the term is ended, can never be corrected. The court of appeals, like every other human tribunal, is not infallible. However able and however careful it may be it is almost sure, at times, to fall into error both as to law and fact—more often the fact than the law. More often, sir, the decisions of our court of appeals go wrong from a misconception of the facts of the case, because of an imperfect reading of the record, than from any misstatement of the law; consequently it is an important privilege that we enjoy in West Virginia of having the right, without feeling that we are trespassing upon the good nature, or any rule of the court, of filing a petition and calling the court's attention to the manifest error into which we believe they have fallen. I have known in my practice good results to follow in several cases from petitions for re-hearing. I do not concur, therefore, with the report, if it is to be understood as coming from the bar of the state, in the matter of requesting the court of appeals to discontinue or discourage the filing of petitions for re-hearing.

PRESIDENT DAILEY: Are there any further remarks on this report?

MR. L. J. WILLIAMS: Mr. President, I do not understand the report of the committee to mean that the purpose was to discourage the filing of petitions for re-hearing, but the purpose was really to show the necessity of the court's giving more careful consideration to every case presented to it and to prepare its opinions with such care beforehand that the filing of a petition for a re-hearing would thereby be rendered unnecessary. I have been told by many men who have a greater amount of practice in the court of appeals than I have, that there are many men who make it a business of arguing their cases orally before that court and that they sometimes go so far as to anticipate what the judgment of the court may be in a particular case, and are armed with a petition for re-hearing, already prepared, before the court has delivered itself of its opinion.

MR. WESLEY MOLLOHAN: That would be a pretty hard job, with our present court.

PRESIDENT DAILEY: Are there any further remarks on this report? If there is nothing further the report will be received and filed.

MR. B. MASON AMBLER: Mr. President, I am only going to make this one speech and I make this one because of the importance of the matter involved. We have many reasons for commending our supreme court. Individually, to the best of my knowledge, they are gentlemen of the highest integrity and most sensitive honor, and the work that they do is enormous. Perhaps we have not always expressed our appreciation as cordially as we ought, and one point is especially worth noting,—and that is that our court does lean with exceptional force towards the real merits and equities of the case, and we ought to make acknowledgment for that line of excellence even if we sometimes are disappointed at having the court overrule some technical proposition on which reliance was placed. But this question about re-hearings is up, and it is due to the court as well as to ourselves to speak candidly about it.

In this city of Parkersburg we have all of the advantages of modern life except that we haven't any member of the court of last resort residing in our midst. What we know about the proceedings in that high tribunal we learn from the docket or from what we witness at the bar; and when our cases are argued or submitted we turn away and go back to our homes, hundreds of

miles from the court and its members. The next thing we learn is that an opinion has been filed by one of the learned judges. It is presumed to have been concurred in by all of the other members because there is no intimation of dissent; and yet in more than one instance the entire court did not consider the case at all, and the presumption of concurrence is supposed to rest on the ancient maxim that silence denotes acquiescence, when in truth a modest silence proceeds entirely from a lack of information on the subject matter. Later on some attorney of easy access to and within a short distance of the court, presses upon some member of it a request for a re-hearing, and it would be right much to expect that a judge should refuse to grant an opportunity to consider a case which he had never considered at all, and thus, under one of those fictions that so minister to justice, the judge now learns of the case and grants a re-hearing in order that it can be considered; and so some of us who are at great distance from the center of judicial administration are made unnecessarily nervous as the echoes of the argument are reverberating around the court room and other places.

If it be true, as the President has just informed us in his address, that in 47th and 49th West Virginia there are decisions directly the reverse of each other, and that the court has announced certain propositions as settled law and then has laid down the opposite as the rule in this state, there could not be an unconscious overruling like this, where cases follow so closely upon each other, if the entire court had been aware of what was decided in both cases. It seems to me that the great number of re-hearings asked for indicates that the lawyers think there is a good chance to get a re-hearing, and this idea is based upon the notion that the court is not satisfied with the opinion when filed. Now, with all respect for the court and for its members and with sincerest congratulations that our court is high and free from all sorts of scandals that in ages past have given cause for dissatisfaction, I still think that the court should so arrange its business as to make every litigant and advocate feel that a case has been fully and fairly considered before an opinion is announced. It is a noble thing but not uncommon with great minds for a man to say: "I have made a mistake and my judgment is wrong and I wish to re-consider it," and I trust the time will never come when our court will refuse a re-hearing when they find they have committed an error; but the proposition at which I now am driving is this: that the entire court should take every precaution against error before any opinion is pronounced; and until the

profession is brought to believe that every opinion is the act of the entire court and expresses the conviction one way or the other of its judges, the court itself will be flooded with these applications for re-hearing, because its opinions will not be respected until the court treats them with respect.

MR. J. HOP WOODS: I hope this is not the last speech my friend Ambler will make. He is one of the members of the Association who adds spice and life and variety to its meetings.

PRESIDENT DAILEY: The President will announce that you need not be disturbed about that.

MR. J. HOP WOODS: However, I do not exactly concur myself with the recommendations of this committee. It seems to me that re-hearings are good things. They are particularly good things for the petitioners, and it is about the only thing that is left of a case, and of all the applications or petitions for re-hearings, very few are granted; very many are called, but few chosen. Now I think, Mr. President, this Bar Association ought to assume that the five members of the supreme court of appeals do, in fact, give their personal attention to all of these cases which they decide. I understand, as a matter of fact, that the judges do go into conference on Saturdays, and there they all, in fact, consider each case as it is presented. A statement is made by one of the judges, and all of the judges understand the facts as they appear in the record. Now if good lawyers can draw opinions upon given facts, why should not better lawyers, who are judges of the supreme court, be able to do so too? It seems to me after the five judges hear the facts in a case, after consultation, that there isn't any impropriety, or any injustice done anybody, when one of the judges thereafter writes the opinion of the whole court.

MR. W. P. HUBBARD: May I ask whether, according to your understanding, a vote is had and a conclusion reached by all the members of the court *before* the case is assigned to an individual judge for an opinion, or does the court wait until that opinion, stating the facts and the law, has been prepared by one of their number, and then consider it and concur or dissent? That is the kernel of the whole thing, it seems to me.

MR. J. HOP WOODS: I understand the rule of practice in the supreme court is this: That there is a consultation on the facts; after the record has been assigned to one of the judges the facts in that particular case are stated in the presence of all the judges, and correctly stated. It seems that it sometimes happens that

one of the judges of the supreme court writes out the statement of facts and another judge delivers the opinion; so it is perfectly apparent that each of the judges understands the facts in the case. Now, these judges in consultation, after the facts are all stated, as I understand the rule of practice to be, decide what the law is upon that given state of facts and assign that case to one of the judges to decide, and then that one judge writes out an opinion, and unless there be some change in phraseology or verbiage, that opinion is concurred in as the opinion of the whole court.

MR. W. P. HUBBARD: How, under that practice, is it possible that instances should happen such as the President alluded to in his address, where the printed opinion in a case is written by one judge and then there is a note indicating that the majority dissent from the minority?

MR. J. HOP WOODS: I cannot answer that exactly and I do not think that that practice in the supreme court is approved, because it seems to me if a judge undertakes to write an opinion, and that happens to be his individual opinion, and then at the end of it the whole court disagrees with him, instead of the judge who writes the opinion stating that while that is his personal opinion the majority of the court disagree with him, I think that opinion should be thrown in the waste-basket. The judge who writes the opinion should write the opinion of the whole court, because it is the opinion of the whole court, and I do not think that a judge should be permitted to interpolate his personal, private opinion into the opinion he writes and then say at the end of it that it is simply his opinion and that the other judges do not concur with him in that opinion. It rather should be the opinion of the whole court and he ought to use the personal pronoun "we" instead of "I." I doubt the propriety of this publishing of decisions in the newspapers, and who delivered the opinion. I think it ought simply to be stated that the case was decided so and so—affirmed, or reversed and remanded—and that the opinion should go as the opinion of the court instead of saying that it is the opinion of a single judge.

PRESIDENT DAILEY: Are there any further remarks on this report? If not, the next matter in order is the report of the committee on Grievances. The chairman of that committee, I believe, is here.

JUDGE T. P. JACOBS: This committee is under the necessity of asking until to-morrow morning to submit its report.

PRESIDENT DAILEY: The committee asks until to-morrow to make its report and it will be assumed that leave is granted for that purpose.

JUDGE T. P. JACOBS: I move that the Association take a recess until two o'clock.

MR. GEORGE E. PRICE: Before that motion is put, I wish to state to the Association that Mr. Eugene C. Massie, of Richmond, Virginia, who is to deliver the annual address before the Asociation this evening, is present in the room, and I want to move that he be given the privilege of the floor of the Association, and that the courtesies of the Association be extended to him, and I would suggest that when the recess is taken that the members be presented to Mr. Massie.

MR. B. MASON AMBLER: I second that motion and ask for a rising vote.

The motion was put by the chair and was carried by a unanimous vote.

On motion of Judge T. P. Jacobs the Association then took a recess until two o'clock p. m.

FIRST DAY: AFTERNOON SESSION.

The Association re-assembled at two o'clock p. m.

PRESIDENT DAILEY: I understand that the committee appointed to audit the treasurer's account is ready to report, and we will take that up now, as it was passed temporarily.

MR. J. HOP WOODS: Mr. President, the committee appointed to audit and state the accounts of the treasurer submits the following report:

REPORT OF AUDITING COMMITTEE AND RESOLUTION CONCERNING THE COLLECTION OF DUES.

To the West Virginia Bar Association:

The undersigned committee appointed on this day to audit the report of W. N. Miller, Treasurer of the Association, respectfully reports that it finds the report correct, and recommends its approval.

Inasmuch, however, as the report finds that there is $878.50 due to the Association from some of its delinquent members, the committee recommends the adoption of the following resolution:

Resolved, That the treasurer within ninety days transmit to the Executive Council a list of the delinquent members of the

Association, with the amount due from each, and that the Council take such measures as in its judgment are proper to collect the same, or otherwise deal with the subject as in its judgment may be proper to prevent further default, and report its action to the next meeting of the Association.

Respectfully submitted,

J. HOP WOODS,
ROBT. WHITE,
Committee.

PRESIDENT DAILEY: You have heard the report and the resolution as recommended by the committee. What shall be done with them?

MR. HARVEY W. HARMER: I move the reception and adoption of the report and also the adoption of the resolution.

The motion was thereupon put and unanimously carried.

PRESIDENT DAILEY: We took a recess on the call for the report of the Committee on Legal Education. Dr. Brooke, I believe, is chairman of that committee.

Dr. St. George T. Brooke submitted the report of the Committee on Legal Education. (See Appendix, page 103).

PRESIDENT DAILEY: What is the pleasure of the Association as to this report? If no motion is made in regard to it, it will be received and filed.

PRESIDENT DAILEY: The next order of business is the report of the Committee on Legal Biography—Colonel Robert White, of Wheeling.

COLONEL ROBERT WHITE: Mr. President, I have endeavored, as far as I have been able, to prepare a memorial of Judge Okey Johnson, and from such data as I could gather in the short time I have had to attend to this duty, a memorial of six other members of the Association who have gone from us within the last twelve months. To that paper may I now ask your attention.

Col. White then read the report of the Committee on Legal Biography. (See Appendix, page 109).

PRESIDENT DAILEY: This report will be received and it will not be improper, I suppose, for members of the Association to make any eulogistic remarks they may desire to make upon any of the subjects of the memorials, if they feel so inclined. If there is nothing further to be said, the matter of the report of the Executive Council was passed over this morning, in the absence of Mr. Willey, who is now present, and if he is prepared to make the report for the Council we will hear it now.

MR. W. P. WILLEY: I have not had an opportunity of meeting the Council. If the Association will indulge us until morning, I shall be able to meet the Council and to make a report.

PRESIDENT DAILEY: That matter will be laid over then until morning and will follow the report of the Committee on Grievances, or precede it, rather, as it is in this program. The next matter in order is the report of the Special Committee on Amendment of Law Concerning Depositions—Mr. Harmer, of Clarksburg, chairman.

Mr. Harvey W. Harmer submitted the report of the Special Committee on Amendment of Law Concerning Depositions. (See Appendix, page 115).

PRESIDENT DAILEY: What shall be done with the report? The report is received. Are there any remarks on it?

COL. ROBERT WHITE: I want to make a motion that Senator Harmer be continued in the capacity in which he has acted, as to furthering this matter, until he can say that the bill has passed the legislature.

The question was put and the motion carried.

PRESIDENT DAILEY: The next order of business is the report of the Special Committee on Uniformity of Legislation—Mr. VanWinkle, of Parkersburg. I believe he is not here, but he has sent his report to the secretary to be read.

The secretary read the report of the Special Committee on Uniformity of Legislation. (See Appendix, page 116).

PRESIDENT DAILEY: What shall be done with the report?

JUDGE J. M. MCWHORTER: I move that the report be adopted and that Mr. VanWinkle be continued as a committee before the legislature.

PRESIDENT DAILEY: It is moved that the report of the committee be adopted and that the same committee be continued to carry out the wishes of the Association relating to those laws, as heretofore expressed.

The motion was put and carried.

PRESIDENT DAILEY: The next order of business is the report of delegates to the annual meeting of the American Bar Association—Mr. W. W. Brannon

Mr. W. W. Brannon submitted the report of delegates to the annual meeting of the American Bar Association. (See Appendix, page 117).

PRESIDENT DAILEY: The report will be received. Are there any remarks upon the submission of the report? If not, the next order of business is the report of the Special Committee on the Torrens Land System—Mr. George E. Price, of Charleston.

MR. NELSON C. HUBBARD: As we are to have the pleasure of listening to an address on this subject to-night, the suggestion has been made that it would be well to defer the consideration of this committee report until after we have heard that address. It has further been suggested that an arrangement might perhaps be made to the satisfaction of the committee and Mr. Massie, as well perhaps, as the members themselves, for a discussion to be held this evening after the address. It is believed by some that we cannot, in that public way, have the discussion that we otherwise might have, and for the purpose of reaching the views of the members, I move that this be made the special order of business for the opening of to-morrow morning's session.

MR. J. B. SOMMERVILLE: It seems to me the better thing to do would be to receive the report and then defer the discussion of it until afterwards. I do not think that much will be gained by withholding the presentation of the report. Some of us would like to know, in advance of the address of the evening, what the report is, and the discussion can then follow later on.

PRESIDENT DAILEY: Mr. Hubbard's motion is that this report be postponed and made the first matter of business to-morrow morning, and you have heard what Mr. Sommerville had to say on the question. Are there any other remarks on the motion?

MR. GEORGE E. PRICE: Mr. President, perhaps it would be proper to say, before that motion is put, that I believe there is no formal report to be made by the committee. We have not prepared any report. In that connection, Mr. President, I think that at this stage of the proceedings a statement or explanation which I desire to make to the Association should be made. At the last meeting of the Association a special committee was appointed to take this matter under consideration and to report at this meeting. That committee consisted of Mr. Westenhaver, of Martinsburg, Mr. Edgar B. Stewart, of Morgantown, and myself. We had an informal meeting, and as Mr. Stewart had given a great deal of attention to this subject, and had read a paper upon it, and neither Mr. Westenhaver nor myself having given much attention to it, it was arranged that Mr. Stewart should collect such information as he could upon the subject and prepare such a bill as commended itself to his judgment, and when he had

accomplished this that he would call a meeting of the committee or submit to us in some way the result of his labors; then we would endeavor to agree upon a report and a bill to recommend to the Association if we agreed to the system. With this understanding I dismissed the subject from my mind, and as I have been busy about other matters I did not think of it again until I received the December number of THE BAR.

PRESIDENT DAILEY: Then you found out what you had done?

MR. PRICE: I found in that number a report, purporting to be from the committee, which was signed by my name, by Mr. Westenhaver's and Mr. Stewart's, in which we are made to say at the end of the report that we believe it would be the part of wisdom to make the system a part of our law. I immediately wrote Mr. Stewart and also Mr. Westenhaver about it, and Mr. Stewart wrote a letter in which he stated that he had not been well and that the editor of THE BAR had been very urgent upon him to furnish something for publication upon the question in advance of the meeting, and he thought this was a very innocent document and would be the means of at least bringing the matter up for discussion, and that he therefore had taken the privilege of signing my name to it. I received a letter from Mr. Westenhaver in which he said that he had not signed the report or been consulted about it. Now, perhaps an apology is due the Association from me from the fact that I had not done anything in furtherance of the object of this committee, but that is the reason why it was not done—because we left it to Mr. Stewart to prepare—but neither Mr. Westenhaver nor myself expected to be committed to any particular view of this subject without being consulted.

Mr. Westenhaver, I believe, sir, unfortunately for the state of West Virginia, and I am sure to the regret of all the members of this Bar Association, to whom he is so favorably known, has seen fit to go out of the state of West Virginia into Ohio. I think it is a great mistake, but he has gone and I cannot speak for him, except to say that he has not read this report nor been consulted about it, and did not express his views on the question. I do not know whether Mr. Stewart is here; if he is he can make his statement about it.

MR. JAMES C. FRAZER: Mr. President, Mr. Stewart was unfortunately called to New York on business, at the last moment, which prevented his being with us at this gathering. I have listened to the remarks of Mr. Price with considerable interest

and I must say some amusement. Mr. Stewart gave the question of the Torrens Land System, as the Bar Association well knows, very careful study and very careful consideration in the paper which was submitted to this Asociation last year, with the result that a committee composed of Messrs. Price, Westenhaver and Stewart was appointed with instructions to report to this session of the Bar Association. That report is now in your hands, if I mistake not.

MR. L. J. WILLIAMS: This subject of the Torrens Land System will, I understand, be the topic of discussion by Mr. Massie to-night, and after hearing what he has to say this Bar Association will be more enlightened upon the subject, and better informed and in a better position to enter into a more intelligent discussion of it at some other time if it sees fit to do so. Therefore, I move you that the further discussion of the subject be deferred until to-morrow.

PRESIDENT DAILEY: It is moved and seconded that the committee to make a report upon the Torrens Land System be directed to report to-morrow morning as the first matter of business. Without intending to discuss the question, it would seem from Mr. Price's remarks that it will take at least that time.

MR. W. P. WILLEY: The motion of Mr. Hubbard was that this report be made the special order for to-morrow morning. But I understand there is a report before the Association. A report in writing has already been made and already been repudiated by one of the members of the committee.

PRESIDENT DAILEY: The secretary tells me he has no report from this committee.

MR. W. P. WILLEY: Well, there is a report here. There is a report, and a very good report.

PRESIDENT DAILEY: Let's have that matter settled, then. What member of the committee is here?

MR. W. P. WILLEY: Mr. Price is here.

PRESIDENT DAILEY: Mr. Price, have you your report ready?

MR. GEORGE E. PRICE: I made my report just now.

PRESIDENT DAILEY: Then you haven't any?

MR. W. P. WILLEY: I undertake to assert here that I have read a report of the Committee on the Torrens Land System, signed by all three members—including the gentleman from Kanawha—of that committee. It was an elaborate report—a re-

port that nobody, it seems to me, would want to repudiate—one of the best reports that has ever been made by a committee of the Association, and I believe that this Bar Association understands that there is a report; that it is *the* report.

PRESIDENT DAILEY: Let the chair make a ruling. The chair rules that it cannot act upon the fact or statement that there is a report here when there is none in the hands of the secretary. The only member of the committee present says he is not prepared to make a report, and does not submit any, and there is no report now before the Association.

MR. GEORGE E. PRICE: Let us understand what Professor Willey is driving at. Do I understand him to say there is a report which has been actually seen by him?

MR. W. P. WILLEY: I did say that I had read a report that had attached to it the names of all three members of that committee.

MR. GEORGE E. PRICE: I understood you to say it was signed.

MR. W. P. WILLEY: I do not know anything about any signatures, but the names of these gentlemen are to it.

PRESIDENT DAILEY: At any rate, the chair rules there is no report now before the Association.

MR. W. P. WILLEY: Mr. President, I want to say this: that the Bar Association here understands that a report was printed in the last number of THE BAR, submitting to this Association the bill that was prepared by the gentleman who makes the address to-night, Mr. Eugene C. Massie; that it is one of the bills that has been prepared with more care than any other bill that has ever been prepared on the subject; that it has been endorsed by the Richmond bar unanimously, and that it has been recommended for adoption by the Bar Association of Virginia to the legislature of Virginia. The report is here in print. I took the trouble to see that a number of extra copies—enough for all the members—should be here for circulation. It is here now, and I second the motion of Mr. Hubbard making it a special order for to-morrow morning.

COLONEL ROBERT WHITE: I understand the ruling of the chair to be that there is no report before the body.

PRESIDENT DAILEY: The chair rules that the committee appointed by this Association cannot submit its report through THE BAR—that it must submit it here.

COLONEL ROBERT WHITE: If it is in order I move to amend the motion made by Mr. Hubbard by providing that the matter submitted—the matter contained in THE BAR—be taken up for consideration of this Association to-morrow morning at the hour named.

MR. GEORGE E. PRICE: Now, Mr. Chairman, I object to that. I think that the chair is strictly correct in what he said—that it is not the proper way to bring matters before this Association by simply publishing them in THE BAR—especially subject matter which has been committed to a committee. If Mr. Stewart has a report to make to this Association let him make it under his own name.

PRESIDENT DAILEY: Let me suggest that if the member of the committee who is here this evening can make some report here to-morrow morning—whether he is prepared to commit himself to anything particular or not—it would be well for him to do so.

MR. GEORGE E. PRICE: I want it understood that I have no objection whatever to a discussion of this question. On the contrary I am anxious to hear it discussed and I do not object to the matter being brought before the Association in any informal and proper way; but I do object to Professor Willey or any other member insisting that there is a report here before this Association, signed by all the committee, when such, I beg leave to say, is not correct. There is no report here signed by anybody and there is nothing that the Association can act upon except it be in the form of some resolution that this particular subject matter be made a subject of discussion.

COLONEL ROBERT WHITE: I see that my friend to my right (Mr. Price) don't exactly like the motion I have made. I am like him, I want this matter to come up for discussion, and I want to hear it and to know what action we ought to take upon this subject. Now, if my friends don't object, I will withdraw the amendment I have offered and offer another one—that he be requested to have a report ready for this Association to-morrow morning at ten o'clock.

MR. NELSON C. HUBBARD: I think my friend Mr. Woods will now be able to answer the question which was put to him this morning, and will be able to understand how it is that judges of the supreme court can decide a case assigned for the writing of an opinion and publish the opinion with a note that the majority do not concur. The principal thing we want to get at, I think, at the present time, is whether we will consider the Torrens Land

System the first thing to-morrow morning, and I move the previous question.

PRESIDENT DAILEY: The discussion seems to have ended and I do not think it necessary to put the motion for the previous question. Mr. Hubbard's motion was that the matter of the report of the Committee on the Torrens Land System be made the special order of business for the opening of the session to-morrow morning. Col. White moves, as an amendment to that, that the member of that committee present to-day be requested to make some kind of a report at the opening of the session to-morrow morning, and that the subject matter of the Torrens Land System be made the special business for that hour. I do not see much difference between the two, but we will put Colonel White's amendment.

The amendment was adopted.

PRESIDENT DAILEY: The question now recurs on Mr. Hubbard's motion as amended.

The motion, as amended, was carried.

MR. W. P. WILLEY: I move now that the report that is in print here in the Association, accessible to all the members, and that was sent here—

MR. WESLEY MOLLOHAN: Why do you call it a "report?"

MR. W. P. WILLEY: Because it so says.

MR. WESLEY MOLLOHAN: It is not a "report;" if you would call it "a bill" it would be nearer to it.

PRESIDENT DAILEY: We will not be too nice about the terms. Over in our country we would call it "a paper writing." Mr. Willey will now proceed.

MR. W. P. WILLEY: Mr. President, my motion is this: that the report signed—or at least with the printed names attached to this bill that has been forwarded here by the chairman, who could not be present, and which is in print here now in this hall, and accessible to all the members—be taken up as a special order to-morrow morning.

PRESIDENT DAILEY: But the Association has already determined to take up as a special order, the first thing in the morning, the report which Mr. Price has been requested to submit.

MR. W. P. WILLEY: I move that this be set for ten o'clock.

PRESIDENT DAILEY: I would suggest, Mr. Willey, that this paper printed in THE BAR and purporting to be a report, might

be taken up for consideration at the same time and as part of that business.

MR. W. P. WILLEY: I will accept that suggestion.

PRESIDENT DAILEY: It is now moved that upon the coming in of the report which Mr. Price is requested to make, that the paper published in THE BAR, purporting to be a report on this subject, be also considered at the same time.

The motion was put by the chair and carried.

SECOND REPORT OF COMMITTEE ON ADMISSIONS.

MR. J. HOP WOODS: I would like to interrupt the proceedings of the Association a moment. The Committee on Admissions beg leave to report, in addition to the eleven names reported this morning, the names of the following gentlemen who have been proposed for membership in the Association: J. Mentor Caldwell, Parkersburg; James H. Strickling, Middlebourne; Waller Staples, Sistersville; W. R. Brown, West Union; Dan B. Leonard, Parkersburg; Ross Wells, St. Marys; Clarence E. Martin, Martinsburg; A. Bliss McCrum, Kingwood. These gentlemen seem to be acceptable, and if there is no objection, I move that the secretary be authorized to cast the vote of the Association for them.

PRESIDENT DAILEY: The committee on membership has made its report recommending the gentlemen named therein as members of this Association, and a motion has been made that the secretary be authorized to cast the vote of the Association for them.

I understand there is a by-law or provision of the constitution, but I would assume, as a matter of course, the committee on membership had inquired into that matter or they would not have reported these names for membership.

MR. J. HOP WOODS: I would just say, in response to what the President has said, that the rule referred to applies to only one of the gentlemen whose name has been recommended, and I understand, upon reliable authority, that that gentleman, Mr. Caldwell, while not a member of the Wood County Bar Association, is an acceptable member of the bar, and is now before that association for membership.

PRESIDENT DAILEY: Well, the chair would rule that the gentleman was not eligible, but whether that is for him to rule now or not, I do not know.

MR. J. HOP WOODS: The committee will eliminate that gentleman's name from the list then.

PRESIDENT DAILEY: The motion has been made, then, that the secretary be instructed to cast the ballot of the Association for those named in the report, exclusive of the gentleman from Wood county, who is not a member of the local bar association.

The motion was duly seconded and carried, and the secretary thereupon announced that he had cast the ballot of the Association as directed, and the persons named in the report of the Committee on Admissions were declared duly elected members of the Association.

PRESIDENT DAILEY: The next order of business is a resolution endorsing a plan for the nomination of supreme and circuit judges by conventions, etc. That is so nearly akin to the other that it might be well to pass it until after the reading of the paper, and unless I hear objections from some of the members of the Association that will be passed. Upon re-consideration, however, I will state that there is a member of the Association present who has a paper that he has written upon the subject of the nomination of judges, and that might be taken up in place of Mr. Alderson's paper, and we can hear Mr. Alderson also when he comes. The gentleman who has the paper is Mr. Clyde Johnson, of St. Marys.

(Mr. Johnson here read his paper, entitled: "A Method of Selecting Judges." (See Appendix, page 120).

PRESIDENT DAILEY: Unless there is some objection, or some motion made to the contrary, the discussion of this paper will go over with the other matter and come up with Mr. Alderson's paper and the resolution.

MR. C. D. MERRICK: Is there a resolution that Mr. Alderson proposes to offer?

PRESIDENT DAILEY: It is not Mr. Alderson's resolution, but there is a resolution that was prepared by somebody—Professor Willey, I believe.

MR. C. D. MERRICK: If it is not out of order I would like to have that resolution read at this time.

SECRETARY HUBBARD: I received this draft of a resolution from Professor Willey and presume it will be presented at his wish.

The secretary read the resolution, as follows:

Resolved, That the members of this Association, Republicans

and Democrats, commend the calling of judicial conventions, circuit and state, that shall be composed of an equal number of representatives of both the dominant parties; and we pledge ourselves to support the nominees of said conventions without regard to the political bias or antecedents of the men so nominated.

PRESIDENT DAILEY: The next order of business on this program is a resolution submitted to the secretary, to be laid before the Association, on the question of "Applications for Re-hearings Before the Court of Appeals." That matter will now be submitted.

PRESIDENT DAILEY: The author of this resolution is now offering it, as I understand, through the secretary. It is here to be read. Can the secretary announce whose it is?

SECRETARY HUBBARD: This resolution was presented by Professor W. P. Willey, of Morgantown.

The secretary read the resolution, as follows:

Resolved, That it is the sense of this Association that ten days "holding up" of an opinion of our court of appeals to allow a motion for re-hearing would be ample time for all practical purposes; and inasmuch as the existing rule, postponing the publication of opinions until the close of the term at which they are handed down, is made for the convenience of the bar of the state, we hereby respectfully commend to the honorable court a modification of said rule as herein indicated.

SECRETARY HUBBARD: And there has been another resolution upon the same subject, sent to the secretary by Mr. M. F. Snider.

The secretary read the resolution, as follows:

RULE XII.—Re-hearing.

1. HOW OBTAINED. No petition for re-hearing shall be entertained unless made, or notice of intention to make filed with the clerk, within twenty days after the decision is announced (unless as otherwise authorized by law), and in case notice is given, unless petition is filed during the term; and no re-hearing will be allowed unless one of the judges who concurred in the decision shall be dissatisfied with the conclusion reached; and no petition shall be entertained by the court in any case, unless the reasons therefor are printed and filed with the petition, but if the decision complained of is announced within fifteen days of the close of the term, the printing may be dispensed with.

MR. IRA E. ROBINSON: I move the adoption of the first resolution read by the secretary.

PRESIDENT DAILEY: Mr. Mollohan, let me interrupt you. I was not certain about this motion when it was first made, but I doubted whether it was in order. After reading paragraph 7 of the constitution, which is as follows: "No action of this Association of a permanent nature or recommending changes in law or the administration of justice, shall be had until the subject matter thereof shall have been reported upon by the appropriate committee to which the same shall have been referred, unless this regulation shall be suspended by a two-thirds vote of the members voting thereon," I think the motion to adopt the first resolution is out of order.

JUDGE T. P. JACOBS: I move that the resolution be referred to the Committee on Judicial Administration and Legal Reform, and that they be requested to report it back to-morrow morning at eleven o'clock.

The motion was put and carried.

PRESIDENT DAILEY: The next order of business, according to the program prepared under the instructions of the Executive Council, is the paper of Mr. Frank W. Nesbitt, of Wheeling, on "The Time Sentence."

(Mr. Nesbitt then read his paper, entitled: "The Time Sentence and the Reformatory System." See Appendix, page 122).

MR. W. P. HUBBARD: There is a motion I desire to make before we adjourn. I move that hereafter the Executive Council provide, as a feature of each annual meeting, a banquet for the Association and such guests as the Executive Council may invite. Heretofore we have had the pleasure of experiencing the hospitality of the bar at the various places at which the Association has met, and while the Association was small, and poor, and not very hungry, the burden was not so great upon those who favored us with the entertainment; but now that we have so grown in numbers, and, according to the statement of the treasurer this morning, in wealth, and, I might add, in appetite, there are perhaps only a few places in the state at which the bar could, without some undue burden upon its members, invite the Association to a banquet, even though, as has sometimes been done, some contribution would be made by the Executive Council. It seems to me we are now in position to follow the method adopted by the American Bar Association, and let the Association's treasury provide a banquet for it and for its guests. That is the reason I make the motion.

PRESIDENT DAILEY: The question is upon Mr. Hubbard's motion.

The motion was then put and carried.

On motion the Association took a recess until eight o'clock p. m.

FIRST DAY: EVENING SESSION.

The Association met in the auditorium of "The Chancellor" on Wednesday evening at eight o'clock, and was addressed by Hon. Eugene C. Massie, of Richmond, Virginia, upon the subject of "Land Transfers, Ancient and Modern." Mr. Massie said:

Gentlemen of the West Virginia Bar Association:

It is a pleasure for a Virginian to be here, as it would be a pleasure and an honor for any lawyer to stand before this impressive body.

The courtesy and distinction with which you have received me, warms my heart and makes me feel at home in this progressive city.

Your state is not new to me, and memory casts her charm around associations with members of your bar in former years.

Indeed, I am indebted to some of them for fees not yet forgotten. Legal skill and embarrassing dexterity, joined to a pugnacity that seemed to feed upon itself, made the way seem somewhat long. But at last the goal was reached, and then every thorn was supplanted by a bud whose fragrant bloom proved most refreshing. Experience has taught me that I am speaking to one of the ablest bars on this continent, men not only full of the general learning of the law but particularly versed in all that pertains to real estate. It is therefore with great modesty that I approach my theme. And I must say in the beginning, in view of some of your deliberations this afternoon, that this paper is not limited to a consideration of the "Torrens System," nor intended as a glossary upon a certain bill which is in the air—I will not say *in nubibus*—among you, though it may serve as a prelude or preface to the discussion which I understand is scheduled for the morning. And this brings me to announce that I have chosen for my subject: "Land Transfers, Ancient and Modern."

(For address, see Appendix, page 132).

At the conclusion of the address, on motion of Mr. E. D. Talbott the thanks of the Association were tendered to Mr. Massie, and he was requested to furnish a copy of the address for publication in the proceedings of the Association.

SECOND DAY: MORNING SESSION.

The Association met, pursuant to adjournment of yesterday, in the auditorium of "The Chancellor" in the city of Parkersburg, Thursday, December 31, 1903, and was called to order by President Dailey.

MR. GEORGE B. CALDWELL: I believe it is provided that the Committee on Admissions may report at the beginning of each session, and I have the honor, on behalf of that committee, to name the following gentlemen for membership in this Association: Henry K. Drane, of Piedmont; Frank A. MacMahon, of Wheeling; A. B. Hunt, of Sistersville, and W. S. Douglass, of Clarksburg. Your committee has made inquiry as to whether these gentlemen belong to local bar associations where such exist, and where there is one they do belong. Mr. MacMahon, I believe, of Wheeling, is the only person in whose county is a local bar association. I presume it would be proper to move, unless there is objection, that the secretary cast the ballot for these gentlemen as members of this Association.

The motion was put and carried, and thereupon the secretary announced that he had cast the vote of the Association for the persons named in the committee's report, and they were duly declared elected members of the Association.

PRESIDENT DAILEY: The special order of business for this hour is the report of the Special Committee on the Torrens Land System, with which will be considered, according to the action of the Association yesterday, the bill that was published in THE BAR.

MR. GEORGE E. PRICE: Mr. President, in response to the resolution adopted by the Association on yesterday, I beg leave to submit the following report:

REPORT OF SPECIAL COMMITTEE ON TORRENS LAND SYSTEM.

At the last annual meeting of the Association a committee was appointed to take into consideration the question of the adoption of the Torrens Land System in the state and if thought advisable to prepare and report a bill for this purpose. Owing to circumstances not necessary to specify, the committee was unable to make such investigation as the importance of the subject requires, and consequently has not prepared any bill of its own on the subject. Such a bill has been prepared for adoption in the state of Virginia by Mr. Eugene C. Massie, of that state, which

we understand has received the endorsement of the Virginia Bar Association. As Mr. Massie has carefully investigated this subject, as shown by the very able and instructive paper read by him on yesterday, the undersigned as a member of that committee appointed at the last meeting begs leave to submit to the Association the bill as prepared by Mr. Massie and as published in THE BAR for December, 1903, as a means of bringing the subject before the Association in such form that it can be discussed. This bill is submitted without recommendation.

GEORGE E. PRICE.

PRESIDENT DAILEY: The report of the special committee is before the Association, and we are ready for any action or for any remarks any one may want to submit on the subject.

MR. W. P. WILLEY: As I understand, you are now calling for action on the report of Mr. Price.

PRESIDENT DAILEY: Yes, sir; which makes the bill published in THE BAR part of that report, and it is all submitted for the consideration of the Association.

MR. W. P. WILLEY: Mr. Chairman, I move that the chair carefully select a judicious committee who shall go over that bill and put it in form and present it to the legislature of this state and urge its adoption at its next session.

PRESIDENT DAILEY: It is moved by Mr. Willey that the chair appoint a judicious committee—number not named—who shall carefully go over this bill, put it in proper shape, report it to the next legislature and urge its adoption.

JUDGE T. P. JACOBS: Mr. President, as a substitute for that motion I offer the following:

The Association, regarding so important a matter as the sudden and radical revolution of the present system of conveyancing and registration of land titles and the adoption of a system untried and little understood; and there being yet more than one year before the next regular session of the legislature; and the Association desiring further information before committing itself to so sweeping and radical a change as is contemplated by the adoption of the so-called Torrens System, therefore,

Resolved, That the present President and Executive Council be authorized and directed at this session to appoint a commission of three members, two of whom are disposed to favor and one of whom is disposed to oppose the adoption of said system, which

commission shall report to the next annual meeting of the Association, as follows:

A. The practical workings of said system in a state or states where in operation;

B. How the same is put into operation and practice;

C. How the same is received and regarded among the people of such state or states;

D. To ascertain by correspondence with well-informed lawyers, or otherwise by personal visitation, the probable cost of adopting said system.

Such report shall be published in THE BAR for September, 1904.

Such report shall include a draft of bill to be considered by the Association.

JUDGE T. P. JACOBS: I move the adoption of the resolution as a substitute for Professor Willey's motion.

MR. J. W. VANDERVORT: I second the amendment proposed.

MR. MOLLOHAN: That covers exactly what I proposed to do, and I second the motion.

PRESIDENT DAILEY: Gentlemen, you have heard the motion of Mr. Willey—that the chair appoint a committee to consider this bill, and put it in shape and urge its passage at the next session of the legislature in a shape that they may recommend—and you have heard the substitute offered by Judge Jacobs.

MR. HENRY M. RUSSELL: I would like to move an amendment to that substitute. It don't seem to me the shaping up of the committee is entirely satisfactory.

JUDGE T. P. JACOBS: I would suggest that the resolution be changed so that a majority of the commission of three may be favorable to the system, and so that we may have a full report upon the merits of the proposed system.

MR. H. W. BAYER: It might probably be well, before this matter is decided, to determine first the time of the next meeting of the Association. It occurs to me that this report should be sent back to the Association before its next annual meeting. Now there has been some discussion or talk that the meeting might be held before the issuing of next September's BAR, and if this should be true, I think it better to so shape the resolution that it shall be reported before the next annual meeting of the Association.

MR. GEORGE E. PRICE: I do not catch from the reading of the

resolution or the substitute offered by Judge Jacobs, whether it provides that this committee is to prepare a bill, that they may conclude it is desirable to have adopted, and submit such a bill to the Association.

PRESIDENT DAILEY: My recollection is it does not provide that, as I remember the reading of it, but we will have the resolution read again.

(The secretary reads the resolution.)

JUDGE T. P. JACOBS: To save the objection raised by Mr. Price I desire to add to that, "that said commission contemplated shall also produce a bill."

MR. GEORGE E. PRICE: If they are favorable to it.

JUDGE T. P. JACOBS: Whether they favor it or not.

MR. GEORGE E. PRICE: I move as an addition to that the words "for the consideration of the Association."

JUDGE T. P. JACOBS: I will accept that amendment.

MR. W. P. WILLEY: I would accept the substitute of my brother here if it were not for one thing, it assumes that we are all entirely ignorant of what has been done under the Torrens System elsewhere. It seems to me there is literature enough upon that subject to inform all the members of this Association, and this would entail upon the committee that acts upon that resolution the work of getting it together—a work that would be superfluous. But I have no objection to it. I would not like to be on the committee, because it would require them to write a volume on the subject of the Torrens System. However, if my brother here (Judge Jacobs) is made chairman he will do that work, and I accept the substitute.

MR. J. W. VANDERVORT: I believe I seconded the amendment and I accept the amendment to that substitute so that it will not have to be voted on separately.

PRESIDENT DAILEY: The Association has heard the motion, which is now on the substitute, the original having been withdrawn.

The question was propounded by the chair and the substitute was adopted.

PRESIDENT DAILEY: The next order of business fixed for today is the report of the Committee on Grievances—Judge Jacobs.

MR. W. B. CORNWELL: Before taking that up it has occurred to me in addition to the resolution for the appointment of that

committee, which this Association has just adopted, perhaps it might be well to appoint another committee, for the purpose of ascertaining what might be the sense of this body and I shall further make a motion along that line, as it occurred to me it might be a good idea.

As in all matters of reform—securing legislation looking to new departures and reforms—the difficulty seems to be in crystallizing public sentiment, or at least in educating the people generally to an understanding of just what is involved. Now this land system, or question, that we are discussing is, of course, not only a new question to the people of the state generally, but also to members of the bar. That being true, and as the chair will select a committee to prepare a bill, etc., and report to this body at its next meeting, it occurred to me that perhaps it would be well to appoint a committee also that would look to the question of giving the result of the labors of that committee which you have just appointed, the widest possible publicity, so that the people of the state generally may be informed on the subject. Not all the lawyers, even, attend the Bar Association's meetings, and there are many who sometimes attend who are not here today. They ought to be posted on the matter, as well as members elected to the legislature, but a small percentage of whom are lawyers; and perhaps it would be well to get up a strong public sentiment, or at least something that would bring the question before the people so that they may understand the workings of it. Now, for the purpose I say—and I do not know what the wishes of this Association may be, or whether there is anything in it or not—but it occurred to me that for the purpose of ascertaining the sense of this body I would make a motion that the chair appoint a committee, also of three persons, whose duty it shall be, after the reception of the report of the committee which has just bee appointed, to take up the question of giving some publicity to the matter, either through printed bill or through the press of the state. As I say, for the purpose of merely enlisting the sense of this body I make that motion. I am not thoroughly satisfied in my own mind what would be necessary.

PRESIDENT DAILEY: The motion is a little indefinite.

MR. C. D. MERRICK: I move as a substitute for that motion that it be left with the committee which has already been provided for, to give the matter such publicity as they may deem judicious and wise.

MR. W. B. CORNWELL: I accept that as an original motion.

PRESIDENT DAILEY: It is moved that the commission which is provided for in the resolution offered by Judge Jacobs shall give such publicity to the conclusions reached by them as in their judgment may be expedient and best.

The motion was put by the chair and carried.

PRESIDENT DAILEY: The next regular order of business is the report of the Committee on Grievances.

JUDGE T. P. JACOBS: The committee will ask until the afternoon session to do whatever it may have to do.

PRESIDENT DAILEY: The committee asks until the afternoon session to make its report. Unless there is some objection it will be granted. The next matter of business fixed for to-day is a paper to be read by Mr. C. M. Alderson, of Charleston, on "The Judge and How to Nominate Him." When this paper is submitted to the Association, after being read, for discussion, the members will recollect that there may be considered along with it the paper read yesterday by Mr. Clyde Johnson, and some resolution, I believe, that was also offered.

(Mr. Alderson then read his paper. See Appendix, page 150).

PRESIDENT DAILEY: The paper just read, or the subject matter of it, is now before the Association for discussion. Are there any remarks to be made upon it?

MR. C. D. MERRICK: May I ask if, in connection with that, the resolution submitted on yesterday is before the house?

PRESIDENT DAILEY: Yes, sir; the resolution submitted yesterday about the nomination of judges and the paper read by Mr. Johnson. The whole subject matter is now before the Association.

PRESIDENT DAILEY: If there are no remarks and there is no desire to discuss the paper or the subject—

MR. C. D. MERRICK: I do not desire to discuss it, but I hope to hear from the gentleman (Mr. Showalter) who was so very earnest in his remarks yesterday afternoon when the resolution was submitted and read. I hope to hear that gentleman speak. He spoke with great earnestness against it and rather served notice upon the Association that there were but five men in the whole Association who would give any support to that resolution. I would like to hear from that gentleman before I make any remarks, and I do not know then whether I shall have anything to say.

MR. E. M. SHOWALTER: I had no desire to discuss it yester-

day and have no desire to discuss it this morning. Mr. Merrick misunderstood my statement when he says that I said there were only five men in the Association who would support the measure or resolution. What I did say was that under the excitement of a political campaign there would probably be only about five men in the Association who would observe the resolution after it had been passed; therefore I thought a discussion of the resolution would avail nothing. I do not care to discuss the question now and did not yesterday.

PRESIDENT DAILEY: Mr. Merrick, it seems to be up to you.

MR. C. D. MERRICK: If it were only up to me and no one else I could certainly dispose of it, Mr. President, but any measure of that kind must of course receive the endorsement of this Association if it is to have any weight before the people of this state or affect the action of political parties, and it was with the hope that the gentleman would really express his reasons for opposing the resolution, that I called upon him, but if I have misunderstood him in taking the position he has now taken in regard to it, I hope he will not only give his reasons but his motives. You know there has been a distinction drawn between reasons and motives. We sometimes give reasons when lying behind them there is a motive that is the real power. Now "what is the motive?" is the question that is really before the Association in regard to that resolution. What is the motive in favor of it on the one hand and what would be the motive behind it on the other?

PRESIDENT DAILEY: If you will suspend a minute we will have that resolution read so the Association will know the exact terms of it.

The secretary read the resolution.

JUDGE T. P. JACOBS: I want to inquire, before Mr. Merrick goes on, why the author of that resolution left out the Populists?

MR. W. P. WILLEY: I am surprised to hear that resolution read again. I do not understand that that resolution is before the house. It was disposed of yesterday. There was another resolution, it seems to me, presented on the subject, which was postponed, too; at any rate that was declared to be not before the house, by the chair, two or three times. In this connection I will ask the Association to indulge me in just a word of personal explanation.

PRESIDENT DAILEY: Let me interrupt you, Mr. Willey, a min-

ute: My recollection is not the same as yours, about the action of the chair on that resolution. The chair ruled that the report, or supposed report, from the committee on the Torrens Land System was not before the house. My recollection is that when this resolution was read some question was raised by Mr. Price as to whether this resolution was before the house, and the chair ruled that the resolution must come from some member but that he could offer it himself on the floor or he might send it to the secretary and it might be read by him; and unless I am mistaken I asked the secretary to announce who was the mover of that resolution and he announced it was Mr. Willey. It was put before the house and it went over for consideration along with the paper of Mr. Johnson and the paper that was to be read to-day by Mr. Alderson. That is the chair's recollection of it. If he is wrong, any any one can correct him, he will be glad for him to do so.

MR. W. P. WILLEY: I remember of moving to have that laid on the table. I want to say to this Association now, because of a remark that was made yesterday, that my attitude towards this resolution is misunderstood. In assisting the secretary and members of the Executive Council—or rather in assisting the secretary in presenting topics for the consideration of this Association—I drew up that resolution at that time, probably with one or two others that were drawn, simply to bring the matter before the Association. When the resolution was read yesterday it did not strike me as very wise, and having heard some discussion on the subject I intended to repudiate the resolution, although I was the author of it. I did not intend to repudiate the authorship, by any means, but it seemed to be a reflection upon the secretary. Now, I didn't mean that. I had not thought of impeaching the secretary in presenting that resolution. The secretary is a gentleman with a high sense of honor, courtesy and veracity, and I would not be guilty of the discourtesy of impeaching his honor here before the Association. I did draw that resolution and send it to him and he put it on the program with my consent, but I did not expect to appear as the author of it. I move now to lay it on the table.

PRESIDENT DAILEY: To be a little more accurate about the facts, the secretary suggests that the chair yesterday held that that resolution was not before the Association for discussion, but had been read for information; that the chair is right in his recollection—it did go over to be taken up with this. The motion now is that this resolution be laid on the table.

MR. GEORGE E. PRICE: I understand that resolution has not

been offered by anybody, and I raise the point of order that the resolution has not been fathered by any member of the Association, and therefore it would not be proper to take any action upon it at all.

PRESIDENT DAILEY: I do not understand that to be the situation.

MR. GEORGE E. PRICE: I understand that is the situation as to Mr. Willey. He does not intend to offer it.

PRESIDENT DAILEY: I understand he was under the impression it would be offered as coming from the Executive Council, but having been offered for him, or in his name, he could have repudiated it yesterday but deemed it possibly unwise. Now he doesn't withdraw it but moves that it be laid on the table, recognizing the fact, thereby, as I understand, that it was offered by him and is therefore before the house.

MR. GEORGE E. PRICE: I understand the chair to say that on yesterday the chair ruled that it was not before the Association but merely read for its information. If it was not before it yesterday it is not before it to-day. I do not make this captiously but I make the point of order to dispose of a situation which is, if that resolution goes on the table—if it is before the Association and goes now to the table it will probably carry the whole subject to the table and dispose of it, and there will be no action taken upon the subject.

COLONEL ROBERT WHITE: I think Mr. Willey has just recognized the fact that his resolution is before this body by moving to lay it on the table. I do not think there is any question about his having thus recognized that fact. Now, I rise to my feet to ask Mr. Willey to withdraw his motion to lay his resolution on the table for the reason, if I understand the workings of that motion, if it is carried it takes this whole subject to the table and so prevents a discussion of this subject, and I hope my friend will withdraw his motion.

MR. W. P. WILLEY: I will withdraw my motion.

PRESIDENT DAILEY: The chair rules that this resolution is before the Association. He merely announced yesterday it was not before the house for consideration. The house itself, or the Association, passed this resolution, with these other matters, over until to-day by recognizing and acquiescing in the statement of the chair that it would go over with these other matters.

MR. B. MASON AMBLER: I move as a substitute for all pending measures the following:

That the Bar Association commends to the people of West Virginia the importance of the judicial office and the necessity of the greatest care and patriotic effort in the election of judges during the coming year throughout the state—and we again urge that conventions for the nominations of judges be held separately from all conventions to nominate candidates for the executive and legislative departments of the government and county offices.

PRESIDENT DAILEY: Is that offered as a substitute for Mr. Willey's resolution?

MR. C. D. MERRICK: I desire to move—not as a substitute but as an addition to Mr. Ambler's resolution, if I can do it—"that they specifically recommend"—I mean by attaching to it—"to the executive committees of both political parties in each county and circuit, that they confer as to methods and arrangements for nominating candidates for judges, looking to such an arrangement as will bring before the people candidates of the highest character and attainments."

PRESIDENT DAILEY: If you offer that as an amendment to Mr. Ambler's resolution, I wish you would put it in writing. I am afraid I cannot state it exactly.

MR. CLYDE JOHNSON: Without objection from the mover of the amendment I desire to move to amend the amendment by conferring authority on the Executive Council of this Association to make overtures to the executive committees of the two political parties looking to the bringing about of such a conference as is mentioned in Mr. Merrick's amendment.

MR. C. D. MERRICK: I accept that amendment.

MR. W. P. HUBBARD: It seems to me we are forgetting what we have already done in respect to this question. If I heard Mr. Merrick correctly he intimated the opinion that whatever this Association might do about this, or perhaps any other question, was not likely to have much influence either with the politicians or the people generally. I regret that my friend—

MR. C. D. MERRICK: I must correct you, Mr. Hubbard. I did not intend to intimate anything of the kind.

MR. WILLIAM P. HUBBARD: I do not see how you could have intended it, if you had looked around and seen upon attendance at this Association all of the candidates for Governor and some at least of the candidates for United States Senator. But seriously, the executive authorities of at least one of the great political parties have paid some heed to an expression heretofore made of

the wishes of this Association. Now I agree in sentiment with the paper which has this morning been read, but I believe the author of that paper will agree with me that there is no probability, the election of judges having once been confided to the people, that they will ever be content to part with that power. There is no instance, I believe, in the history of the modern method of appointment where that method has once been abandoned. Now considering that fact, and considering others, this Association deemed that the line along which practical progress might be made was to endeavor to procure the holding of separate conventions for the nomination of judges. It was thought that was all that could be accomplished, and four years ago committees were appointed, if I recollect right, who were authorized to confer with the state executive committees of the Republican and Democratic parties, and urge upon them the holding of separate conventions for the nomination of candidates for the supreme court of appeals. The situation in the circuits would probably take care of itself. Conventions for the nomination of judges there are likely to be held apart from conventions for the nomination of political officers. This much progress was made with respect to the action of the executive committee of the Republican party. I am not advised as to what was done by the executive committee of the Democratic party, but I hope they at least went as far as the others. I believe, whether they have already done so or not, they would do so if the matter were further taken up with them. The Republican state executive committee considered this matter and prepared as one of the rules for the government of the party a rule that the executive committee might in its discretion call a convention for the nomination of judges for the supreme court of appeals separate and distinct from the general convention for the nomination of other state officers; and that rule was recommended by that committee and was, according to my recollection, adopted by the state convention of the Republican party; so that in that organization at least they have been proceeding on a line which this Association, after having fully considered the matter, deemed the only practical line for us to give any attention to. Now, if it is still the opinion that that should be done, isn't that the only practical thing to be accomplished—the resumption of the effort to have separate conventions held for nominating judges of the supreme court of appeals by each of the great parties of the state.

MR. WESLEY MOLLOHAN: I believe what Mr. Hubbard states is correct—that the last state convention of the Republican party

(I get this from information and not by any participation in that convention) did adopt that rule, and have heard that it is the policy of that party to be governed by that rule in the selection of appellate judges—that a separate convention should be called for that purpose, where it would not be within the power of politicians to trade off the position of an appellate judge for votes in favor of some man who was a candidate for some one of the executive offices. To show how much care is taken by the ordinary delegate to a state convention in the selection of a candidate for judge of the court of appeals, I desire to give this Association a personal experience on that subject that I once had in a convention. At a convention held in this city several years ago (it was a Democratic convention) candidates for the court of appeals were being nominated and voted for. I belonged, of course, to the Kanawha delegation. One of the candidates—and he was a very capable man, by the way—was put in nomination and a very glowing tribute was paid to him, and in the course of that tribute it was stated that on a certain battle-field, during the late civil war, he had ridden a gallant black horse. There was a member of that delegation who was somewhat "horsey," and when we went around to take the vote we inquired of that delegate for whom he desired to cast his vote, and he said he desired "to cast it for that horseman." That seemed to be his idea of determining who was a suitable candidate for the position of judge of the supreme court of appeals. Now, we never will get proper candidates for the judicial offices unless we separate the conventions that nominate those candidates, and when we separate them, then the delegates will go to those conventions imbued with the idea that they go there for the purpose of nominating suitable and proper persons for those positions, and the very fact that the conventions are separate carries with it that idea. Therefore I move an addition to the amendment offered by Mr. Ambler, as follows: "And we again urge that conventions for the nomination of judges"—and I do not want that to apply alone to judges of the court of appeals but to all judges—appellate, circuit and county judges—"and we again urge that conventions for the nomination of judges be held separate from other conventions to nominate candidates for the executive and legislative offices of the government and county offices;" that these conventions shall be held separately from the others, where a man cannot trade off his vote for a judicial office in order to get the support of some man for constable; and I believe, gentlemen, that that is the best this Association can do at this time, and

I believe it will be a great advance and that good results will come from it. I move this as a substitute for all the resolutions on this subject, with the amendments, and I have just understood, aside, that Mr. Ambler accepts this amendment.

PRESIDENT DAILEY: I was going to say that the chair does not know "where he is at," hardly. Mr. Ambler's resolution was offered and Mr. Merrick offered an amendment to that by way of addition. Mr. Johnson offered a further amendment to that, which I understand was accepted by Mr. Merrick. Now, I understand that Mr. Mollohan offers this as a substitute for Mr. Merrick's amendment.

MR. WESLEY MOLLOHAN: For all the resolutions on the subject.

PRESIDENT DAILEY: But this is not a resolution in itself; it is only an addition to Mr. Ambler's resolution, as I understand it.

MR. B. MASON AMBLER: Mine was offered by way of a substitute; it was the first substitute resolution before the house. He amends my substitute and I accept that, and now the whole proposition comes up on the substitute.

MR. GEORGE E. PRICE: As I understand the matter it is this way: This resolution, with Mr. Mollohan's addition to it, stands as the original resolution, so the only amendment is Mr. Merrick's.

PRESIDENT DAILEY: That is right, I have no doubt. All I want is for the Association to understand the matter. Mr. Merrick is recognized.

MR. C. D. MERRICK: I do not wish to speak at any great length on this subject. I do not expect the Association to go as far as I would be willing to go upon it, but I know the Association is going a long distance in advance of where it would have gone three or four years ago. I know it is moving and that the sentiment of the lawyers of the state has been moving—advancing—in this respect, and they have been getting some light from some source that they didn't have before; so I am willing to go with them as far as they will go, and I hope they will go farther with me later on. Now, the resolution which Mr. Mollohan has offered here as an amendment, I think might be incorporated, perhaps, with what has been already offered. I do not understand that Mr. Mollohan would be unwilling to go farther than he has proposed here if it would be possible to obtain the support and acquiescence of the executive committees of the political

parties of the state in a direction which would enforce the principle he is laboring for. I do not understand that he would oppose that and I do not think he would; and I think there are strong, able, learned men in this Association who would go farther than that if it were feasible and practicable, and some day they will go farther. I am willing to meet them now as far as they will go, and as I say, I hope farther along they will take another step in advance. The resolution offered here, with the amendment I recommend coupled to it, provides a practical way of getting at this matter. The attention of the executive committees of both parties in the state could be called especially to this question and their efforts obtained in a direction which would place before the people men of high attainments and high character for these offices, whether they are nominated in separate conventions, or in joint conventions of both parties, or whether they are placed before the people by some other method that will give to us candidates we can respect and vote for with a clear conscience, and who will, we believe, protect to the best of their ability and of their conscience the liberties, property and good name of the people of this state whenever it comes before them. Now, then, I said a few minutes ago—when things took a different track, somewhat, from what I thought they would—that there had been a difference drawn between reasons and motives, and it is not the reasons but the motives behind this thing that stand in the way of adopting resolutions far in advance of anything that has been offered to-day. Search your minds and hearts, gentlemen, and see if that is not the case. It is not the reasons that are in the way of these resolutions but the motives behind them that will obtain their support, and if they fail it is not the reasons, it is the motives behind it all that will prevent their adoption. Let's get at the bottom of this thing. Aren't we afraid, some of us, that some resolution will be adopted here that will take out of the control of parties and politicians something that will assist in carrying the election in favor of the party and give strength to party politics? Isn't that the motive? I do not ask you to acknowledge it, but you cannot help but acknowledge it if you speak right out plainly and say what is in your minds. Now, that is not the motive that should actuate in this matter. We ought to go as far as we can in the direction of placing men before the people as candidates for these offices who care nothing about politics when they run for such offices and who care nothing about politics when administering the duties of the offices, and we should not inquire anything about

that when we place these men before the people; we should not make judicial offices a bribe in any way to a party or to politicians. We ought to look the motive squarely in the face, in the consideration of this question; and I do not care in what form it may come before the Association, or when it may come before it for consideration, unless we can do so the question will never receive fair, just and proper treatment. Again, I say, I am willing to meet any of these gentlemen as far as they are ready to go, and to go farther.

MR. W. P. HUBBARD: I have, in pursuance of Brother Merrick's invitation, searched my mind for ulterior motives, and I haven't found any. If Brother Merrick don't believe me he can search for himself. If he be sincere in his advocacy of what Mr. Mollohan proposes, I would suggest to him that the way for him to manifest his sincerity is not to embarrass that resolution by any proposed amendment, but let it be voted upon, and then let him offer his as a separate and additional proposition to be dealt with as such. Maybe there is no conflict between the two. If so, it would be extremely unfortunate that one of them should have to be hung on as an amendment proposed to the other. Now, if my friend will reflect a moment I think he will see that if those of us who are advocating—as the only practical method up to date—the holding of separate conventions, were actuated by any political motives whatever, that we would see our gain in maintaining the methods that have prevailed heretofore, by which judgeships have been thrown into the grab-bag, out of which politicians plucked them as prizes. But how it could even have occurred to the gentleman to suggest that any political motives, for the purposes of political advantage, actuate those who are desirous of getting the nominations for judges out of the political conventions, is past my comprehension.

MR. MERRICK: Again the gentleman misunderstands me.

MR. W. P. HUBBARD: Sir?

MR. C. D. MERRICK: I haven't suggested anything of that kind. I say the gentlemen who oppose such resolutions, whether in the form of mine or Mr. Mollohan's, have a motive behind them.

MR. W. P. HUBBARD: I haven't heard anybody opposing Mr. Mollohan's, unless you are going to oppose it. I again ask, why don't you permit a vote to be taken upon that resolution, by which vote the gentleman can find out whether anybody does oppose it, and if he finds that it meets with no opposition, then

he will also find to his satisfaction and to ours that there is no man in this Association worthy of the name of a lawyer who will oppose any such resolution, and he will then be very much relieved in his mind with respect to the motives that are actuating anybody here. If, on the other hand, he does not see his way clear to do that, I ask this Association to vote down his amendment and to pass the resolution offered by Mr. Mollohan, and then another opportunity will be presented for Mr. Merrick to present his plan.

MR. C. D. MERRICK: I am very glad, Mr. President, to find Mr. Hubbard standing almost side by side with me. I do not think there is any conflict between Mr. Mollohan and me, either, and I would ask Mr. Mollohan if he is not willing to add his resolution as an addition to the resolution already before the house.

MR. WESLEY MOLLOHAN: Mr. President, I desire to get the best we can on that subject. In the future we may make further advances, but at the present time I believe my resolution is the best that can be gotten. I desire to say that I have no motive in this matter; I am no candidate. I take it that it is the wish of the lawyers here who belong to the Republican party that we get the best results possible in the nomination of candidates for judges; I also take it that a like wish exists in the minds of the members of this Association who are Democrats.

A VOICE: And the Populists, too?

MR. WESLEY MOLLOHAN: And the Populists, too—everybody —every lawyer on this floor. I take it that there is no member of this Association who desires to lower the standard of candidates for judgeship for mere personal and political motives. If so, he has no business in this Association. Now we all know that if separate conventions be called to nominate candidates for judicial offices that an entirely distinct class of delegates will go to those conventions from the class that goes to the other conventions. They may be to some extent lawyers, and they will go there, I take it, the most of them, for the sole object and purpose of getting the very best men possible, and in that way we can make a great advance in this matter. I believe it to be impracticable at this time to take the nominating power from the people and have the nominations made by party committees. I do not believe it practicable and I doubt very much whether it would be legal or better than the method proposed by that resolution and that as good results would come from it. The people want something to say through some class of their citizenship as to the se-

lection of the candidates for judges, and this will put it there. If the lawyers of the state and the good citizens of the state desire suitable and proper candidates for these offices, they can select them.

MR. JOHN BASSEL: Mr. Chairman, I join with the gentlemen sitting around me here in the hope that the resolution, in the form presented by Mr. Ambler with the addition made by Mr. Mollohan, will be adopted, for the reason, as they say, that it seems to be the best that is attainable under the circumstances. Now, I want to state one or two things by way of reminiscence that possibly may not be known by all the members of this Association. In the history of this part of Virginia and in the eastern part of Virginia, it is a notorious fact that more of the able judges that Virginia had from 1830 down to the beginning of the civil war, were selected from the party opposite to that which was in power in the state, and I will give one notable instance related to me by the late Charles James Faulkner, Sr., not many years before his death. We all know that Judge Briscoe G. Baldwin was one of the ablest judges who ever graced the supreme bench of Virginia, and his opinions to-day rank possibly as high as those of any other judge who ever sat upon that bench. Mr. Faulkner said that in 1840, when a vacancy occurred in that court, that the name of Judge Baldwin was suggested by his friends—his Whig friends—and a Democratic lawyer was proposed in opposition to him who was greatly his inferior in ability and legal attainments, and Mr. Faulkner stated that he and a number of other prominent Democrats who were active in the politics of that day in the Democratic party, went to Richmond in the interests of Judge Baldwin and secured his election by a Democratic legislature. The late Edward S. Duncan, who was one of the ablest circuit judges west of the Alleghenies, was a Whig when he was elected by the legislature in 1830, which legislature was Democratic, and he remained on the bench a Whig until 1838, when he resigned. The same thing was true of Joseph L. Fry, one of the ablest of the circuit judges. Now, I say it will be something approaching the millenium, in the selection of the judiciary at least, if we can get back to times like those. That does not seem, however, in the present condition of political parties in this country, to be practicable, but I hope at least a long step will be taken in securing such a beneficial result by adopting the policy outlined in the resolution. Now, just a few words more: Without mentioning names, I can give some experience we have had not far from here in the last few years, in a county not far from my own, which

was supposed to be dominated by one of the political parties. It was supposed to be in the supremacy, and a nomination was made for the office of county judge—for judge of the criminal court—and a good man was nominated—a lawyer of great respectability and high character. The opposite party thought that the election of that man was certain, and they took very little pains in nominating a man, and they put some man on the ticket merely for the purpose of completing the ticket, and to the surprise of everybody it turned out that the party to which he belonged was victorious in the election and he was lifted to the bench, and during his whole term the lawyers both of his own party and of the opposite party were ashamed of him, and only took cases in his court and tried them when they could not help it. Now, that is an illustration of how this system is working and I hope in common with the gentlemen around me to have enough independence in politics to say on that question: "I will not vote for an unfit man, I do not care by what party he is nominated." And I want to say that I have carried out that doctrine more than once in my life. I never have been bound by party ties in a matter of that kind, and I won't be. When we reach that stage of independence that is one of the glories of English politics—because men there are more independent in reference to their party organization and less bound by party ties and owe less fealty to party than we do in this country—I say so far as the judicial branch of the government is concerned, whenever we reach that stage we will have judges we can honor and in whom we all have confidence.

MR. GEORGE B. CALDWELL: As a practical man, I do not think we can hope to go, at this time, as far as the resolution first offered would reach. I do not think that these resolutions would amount to any more than an expression of a desire on the part of this Association and would have no practical effect whatever. We can't hope at this time to take away from the nominating conventions of the great parties of the people of this country, the nomination for judges of the supreme court. They will be put upon the party ticket and the people will not delegate the power to any one else. Hence I am in hearty accord with the resolution by Mr. Mollohan, and with the views expressed by him and others here to-day in favor of that resolution. I only wish now to repeat what has been said in a more able manner than I can say it, that I am in favor of accomplishing something, of doing something practical. That is what is of value; that is what should commend itself to us here to-day, and that resolution of

Mr. Mollohan's, as I understand it, only expresses a desire that separate nominating conventions should be provided for, by the executive committees, in nominating judges. In order to give that practical effect I would suggest that there should be added to that an instruction in proper form, impressing upon the executive committees who call the nominating conventions the propriety of this matter, and urging upon them the calling of a separate state convention for the nomination of supreme judges. If the thing is left merely in the shape of a resolution from this Association, the gentlemen on those executive committees may read it and they may take it up or not; but if it is urged upon them as a body, personally by the Executive Council of this Association, the resolution offered by Mr. Mollohan if passed here to-day will be more likely to be carried out and to result in something tangible. Now, the Republican party has already, as we are informed, passed a resolution that the executive committee is recommended to call such separate conventions. That should be still further urged upon them personally and by some one especially deputed by this Association to perform that duty. If it is not done it will probably pass along and the resolution of Mr. Mollohan, if adopted here to-day, will fail of practical effect for want of attention. I therefore move, as an addition to Mr. Mollohan's resolution, that the Executive Council be instructed to urge upon the Republican executive committee and upon the Democratic convention, in all respectful and suitable ways, that separate conventions shall be called by both of the parties for the nomination of candidates for supreme judge.

MR. E. M. SHOWALTER: I do not want to make any motion. I think probably there are already enough motions before the house. I anticipated yesterday, when I unwittingly made a motion, that if this discussion were prolonged it would result as it has to-day; and yet I do not think we are very far apart. I believe we are all together and I do not believe that the sentiment expressed here is confined to this Association. I believe it extends even outside. The people share with us in the same feeling with respect to the importance of the matter of selecting judges throughout the state, and it is even shared, I will undertake to say, by some of the politicians as well. Now, it seems that I am probably the only one—on account of that motion made yesterday—to whom the suggestion of an ulterior motive may apply at this time; but I want to disclaim any ulterior motive on that proposition. I agree with all that has been said, but there has been one feature about this discussion with which I cannot agree:

there seems to be too much of a disposition to insinuate that the judges of West Virginia are not to-day what they ought to be. It may be, Mr. President, that in a few of the circuits mistakes have occurred, and that men are on the bench who ought not to be there. That will always be the case, I take it, in this state and everywhere else in this country. I do not care how many resolutions this Association passes; I do not care how many barriers you put around the selection of judges, there always are times when men who are unfit will be on the bench in some places. As much as I was interested in the historical allusions of my friend Mr. Bassel, permit me to say that those things are not confined entirely to ancient parties. Only at the last election in one of the judicial circuits of this state, one of our most eminent jurists and brilliant men was placed upon the ticket by a unanimous vote, by one of the great parties, in a political convention where other men were nominated for other offices, and the next week the other great party in the same circuit placed that same man on its ticket for the same office, by unanimous vote. Now, I say we have some virtue even now, and under that plan of selecting judges the purpose is that both parties are to get the best judges and the most upright and most learned men, but whether they do or not will depend entirely upon the intelligence and integrity of the people selecting them. Therefore I am ready to vote in favor of any or all of these resolutions, and they will be operative simply in proportion to the intelligence and integrity of the people who receive them, or are in position to receive them. Therefore, as I suggested yesterday, we can discuss this matter all we please, and pass all the resolutions we want to, commending ourselves for the high stand we are taking; still the fact remains that we are not very much ahead of the common people.

MR. GEORGE B. CALDWELL: I withdraw the motion I made with reference to instructing the Executive Council to urge upon the parties separate nominating conventions for judges, and in case Mr. Mollohan's resolution carries, I shall renew the motion in separate form.

MR. C. D. MERRICK: I move as a substitute for Mr. Mollohan's motion that what is offered here be added as an addition to the amendment which I offered, if it is consistent; it simply defines more definitely what is wanted.

PRESIDENT DAILEY: If I understand Mr. Merrick's motion, let's see how it will be brought before the house. The original resolution was Mr. Willey's, reported from the secretary's desk. As a substitute for that we have Mr. Ambler's resolution as mod-

ified by Mr. Mollohan and accepted by Mr. Ambler. As a proposed amendment to that is Mr. Merrick's addition modified by Mr. Johnson and accepted by Mr. Merrick. The substance of the resolution Mr. Ambler offered as a substitute, was calling attention to the importance of the office and suggesting that we persevere in the steps heretofore taken to bring about an improvement, with the modification that the policy heretofore adopted by this Association shall be persisted in and that the executive committees of the different parties shall be urged to hold separate conventions for the nomination of judges of the supreme court and of circuit judges throughout the state. Now, I believe the motion of Mr. Merrick is to add Mr. Ambler's substitute resolution to his as a modification, and I do not believe that can be done in that way.

MR. C. D. MERRICK: May I beg the pardon of the chair? You mean, as I understand it, that Mr. Ambler offered a substitute for Mr. Willey's motion and I added an amendment to that, or an addition.

PRESIDENT DAILEY: That is, to Mr. Ambler's?

MR. C. D. MERRICK: Mr. Johnson offered an amendment placing certain duties upon the Executive Council, which I accepted, then comes Mr. Mollohan's resolution.

PRESIDENT DAILEY: And it became part of Mr. Ambler's, by his consent and acquiescence, and stands now as a substitute for Mr. Willey's resolution.

MR. C. D. MERRICK: If the chair pleases, my motion has never been voted upon.

PRESIDENT DAILEY: Certainly not; we have been discussing it, and it comes up now, as I understand, upon the amendment offered by Mr. Merrick to Mr. Ambler's resolution as modified by Mr. Mollohan and accepted by Mr. Ambler.

MR. C. D. MERRICK: Now I move as a substitute for Mr. Mollohan's resolution that that be added as an addition to my amendment that I have offered. That is my motion.

PRESIDENT DAILEY: And that I rule out of order. The question is upon Mr. Merrick's amendment. The Association will, of course, understand that probably the important feature of that amendment is the direction to the executive committee to do certain things. It has already been announced that if Mr. Ambler's resolution is adopted a separate resolution will be offered to that effect, making it the duty of someone to act upon

the matter. That, of course, can be done. The question now is upon Mr. Merrick's amendment.

A vote was taken, and the amendment was lost.

PRESIDENT DAILEY: The question now recurs upon the adoption of Mr. Ambler's resolution, modified by Mr. Mollohan and accepted by him.

The resolution as modified was adopted.

MR. GEORGE B. CALDWELL: I offer the following:

Resolved, That the Executive Council be instructed to urge upon the respective committees of the leading political parties the holding of separate conventions for judicial nominations as recommended by this Association.

This don't apply merely to the supreme court of appeals but to all.

The resolution was adopted.

MR. HENRY M. RUSSELL: If the chairman will permit me, before leaving this question of the judicial matter, I would like to call attention to a recent action of the supreme court of appeals of this state. The Bar Association has undertaken at various times to instruct the supreme court as to what it ought to do and has occasionally criticised it a little. I think, those being the circumstances, we ought to take notice of some of the recent actions of that court in the direction of hearing cases in a better fashion and in a way which will give them an opportunity to take up cases promptly after they have been argued and submitted, and to consider and decide them. As is known, I presume, to everybody here, the supreme court has recently adopted a plan by which its docket for the coming term at Charleston is to be so arranged that cases will be heard two or three at a time and at intervals, so that the court will be permitted to have an opportunity to take them up after they shall have been argued and submitted, and to consider them promptly and to decide them without unnecessary delay. It seems to me under the circumstances that this Association ought to take some notice of that action by the supreme court, and I therefore offer the following:

"The Association takes this method of expressing its appreciation of the action recently taken by the Supreme Court of Appeals in changing the arrangement of its argument docket so as to permit the consideration and decision of cases promptly after their submission. Believing that the working of the new method will facilitate the labors of court and counsel toward the advancement of justice, the Association regards with pleasure this

further instance of the court's earnestness in the discharge of its duty."

MR. HENRY M. RUSSELL: I offer this resolution and move its adoption by the Association.

The resolution was adopted.

PRESIDENT DAILEY: The special order now is the report of the committee on the resolution offered relative to re-hearings in the court of appeals.

MR. W. W. BRANNON: I beg the indulgence of the Association now, or at some period in the immediate future, in order to present a matter of a personal nature and to raise a question of personal privilege. The matter is short and I will take it up whenever the Association is ready to hear me.

PRESIDENT DAILEY: I suppose if it is a matter of that kind that it ought to be taken up whenever a member asks it.

Mr. W. W. Brannon then read his petition, as follows:

To the West Virginia Bar Association:

I respectfully represent to this honorable body that in an opinion rendered by Judge M. H. Dent, in a cause recently decided in the supreme court of appeals of this state, wherein M. S. Holt was plaintiff and John King and I were defendants, the said judge took occasion to reflect most seriously and severely upon my honesty and integrity.

And I am advised by my counsel, and other able and disinterested lawyers who have read and studied the case, that the said reflections are based upon no evidence in the case, and are entirely without justification.

I have no hesitation to avow that in my opinion if such reflections be justified, I would regard myself as an unworthy member of this honorable body, and to declare that it should purge itself of such membership. I am sure that the Association owes such investigation to itself.

Therefore I most earnestly but humbly ask that the West Virginia Bar Association instruct its Committee on Grievances to study the whole case carefully, investigate the whole subject and report the facts and circumstances to this Association, together with such recommendation as to it may seem proper in the premises.

I submit herewith a transcript of the record in the cause, copies of the two opinions rendered by Judge Dent, and all the briefs of counsel filed in the cause.

I respectfully ask as early consideration of the whole subject as can be given by the said committee and this Association.

Respectfully submitted,

W. W. BRANNON.

MR. JOHN J. DAVIS: In order to carry out the desire of Mr. Brannon I have prepared some resolutions that I propose to offer instructing the Committee on Grievances to take up this matter and investigate and report as early as possible to the Association what in their judgment and opinion should be the proper action to take. I desire to state to the Association that I was counsel for Mr. Brannon in the case in which the opinion was rendered in the court below and was also associated in the court of appeals with my friend Mr. Mollohan from the county of Kanawha. I am somewhat familiar with all the facts in the case, having been in it from its inception and having tried it in the court below, and I have no hesitancy in stating from my own personal knowledge of the facts contained in that record that there was nothing in the case to warrant the reflections cast upon Mr. Brannon.

PRESIDENT DAILEY: I would suggest that I think the only matter for consideration now is the question of referring this to the Committee on Grievances. I believe in the absence of Judge Dent that under the constitution and by-laws there ought to be no discussion of the merits of the case now.

MR. JOHN J. DAVIS: In order to permit the inquiry I offer the following resolution and move its adoption:

Resolved, That the Committee on Grievances be, and it is hereby instructed to proceed as soon as it conscientiously can, carefully to examine and investigate the whole matter contained in the communication this day presented by W. W. Brannon, a member of this Association, and to report all the facts and circumstances in said communication asked, together with such recommendation as to it may seem proper in the premises.

PRESIDENT DAILEY: You have all heard the resolution. Are there any remarks?

MR. GEORGE B. CALDWELL: While I know nothing about the case referred to, or about the expressions to which reference is made, it does seem to me that it is proper to raise the point of order here that these resolutions are not such as this Association ought to assume to consider. I do not think it is competent or consistent with propriety that this Association should undertake

to assume upon itself that it is a tribunal to pass upon the propriety of a matter in any way connected with decisions officially made by the Supreme Court of Appeals. I do not even know whether this opinion is one in which Judge Dent spoke for the whole court or whether it is one which was merely his individual concurring or dissenting opinion—

PRESIDENT DAILEY: Will the gentleman let me interrupt him just a minute?

MR. GEORGE B. CALDWELL: Certainly.

PRESIDENT DAILEY: I understand this comes up as a matter of personal privilege on the part of Mr. Brannon. He asks an investigation of the matter imputed to or charged against him in that opinion. Now, I heard of this and was doubtful whether this matter could come before the Association except through the Committee on Grievances; but I am inclined to think, as there seems to be no special provision made in the constitution or by-laws for the Committee on Grievances to consider anything save where it is brought before them by a charge of some member against some other member of the Association, that there must be some way in which a member of this Association can ask an investigation of imputations against his character, and it seems to me this is the proper way to do it. I only want to call attention to the fact that it is not a question of criticising the court, it is a question of Mr. Brannon protecting himself.

MR. GEORGE B. CALDWELL: And that involves the Association setting itself up as a superior tribunal to pass upon the propriety and truth of an opinion of the Supreme Court of Appeals, and I respectfully submit that that is going beyond our proper sphere, and that where the supreme court passes on any man's conduct, whether in a civil case or criminal case, what they say in passing, in one of their opinion officially made under their oaths and a sense of duty together, ought not for the sake of opinion, or on any supposed question of personal privilege, to be passed upon by this lawyers' union.

PRESIDENT DAILEY: Is it your opinion, Mr. Caldwell, that the motion is not in order.

MR. GEORGE B. CALDWELL: Yes, sir; I think it is out of order.

PRESIDENT DAILEY: I overrule that position and hold that the resolutions are in order. The motion now recurs upon the adoption of the resolutions. Are there any further remarks?

The question was propounded by the chair and the resolutions were adopted.

PRESIDENT DAILEY: The next order of business is the report of your committee, Mr. Ambler, unless we want to take a recess. Let me suggest to the members of the bar that this is a very important question—the practice in the court of appeals and the rules—and it will be important for all of you to hear and act upon this report if you can.

MR. B. MASON AMBLER: This judiciary committee consists of Messrs. Reynolds, Vinson, Knight, Howard and Ambler. Nobody is here but myself, so this is rather in the nature of a special commissioner's report.

SECOND REPORT OF THE COMMITTEE ON JUDICIAL ADMINISTRATION AND LEGAL REFORM.

The committee respectfully reports upon two resolutions offered on the 30th inst., and referred to us regarding—

1. The publication of opinions after ten days from their rendition, except where a re-hearing is asked in the meantime; and

2. Limiting the time for applying for re-hearings to twenty days from date of filing of opinion.

These two propositions are akin so far as they touch the subject of re-hearing, but they are distinct in character and rise from different sources.

1. It is desirable that decisions should be in the hands of the profession at the earliest date practicable for the purpose of informing the bench and bar of the principles laid down. The law publications and especially the law reporters are interested to print promptly the utterances of the court. It is manifestly desirable from every standpoint that questions settled by this high authority should be promptly given the widest publicity. We find that in some courts opinions are printed and given to the law press forthwith and immediately published. This is the case, for instance, in the Supreme Court of the United States, and in Virginia, and there can be no possible objection to giving out an opinion, as announced, where it is the collective, deliberate conclusion of the entire bench of judges, and is understood and intended by each of them to be the action of the whole court, or at least to be the result of their joint labor. Whether an opinion is unanimous or whether it is only that of the majority, it should still express the determination of the court, even where there is dissent. In fact, where dissent appears, there is the strongest evidence that views have been compared. Where a con-

clusion has been reached and announced, say on the 1st day of December, there is no reason why it should not be published immediately, even though it should afterwards be reviewed and reversed by the court on re-hearing. And yet the cause or ground of holding up opinions under the present rule is that the court should be left free to change the opinion in case a re-hearing should be granted or a change of view should occur on the subject discussed.

2. It is supposed that a more rapid putting out of opinions can be accomplished if the time is limited for applying for re-hearing, and it is suggested that at least those opinions upon which no re-hearing is asked ought to be given out for publication as soon as the time for re-hearing is past.

The proposition to limit the time for applying for re-hearing is wholly distinct from the matter of publishing opinions.

We beg to point out to the profession and to the honorable court that the existing rule regarding re-hearings is published in 23 W. Va., A. D. 1884, when Johnson, Green, Snyder and Woods constituted the court, and the letter of that rule remains unchanged to this day. The thing that agitates this question and causes much widespread trouble on the subject of re-hearings asked for indicates that the profession inclines to think that as an appeal has been taken from one judge in the lower court to the higher, so after an opinion is filed a further appeal can be had from the single judge who filed the opinion to the supreme court sitting *en banc*, to review the errors committed by one of its members, as upon a writ *coram nobis*.

This is believed to be the candid truth, and there is only one place where that condition can be corrected, and that is with the court itself, and your committee is informed that at this time the court is putting into practice a system under which there will be conference and united action by the entire court on every case before any supposed result is announced.

No change in the time limit will remedy the difficulty, which in days gone by has lain back of the whole question, and that is that the court has been gorged with these applications for re-hearing, piled up in such manner that it has caused embarrassment, and in some cases, no doubt, has disabled the members of the court from considering fully some applications that ought to have been granted.

A few months ago in an opinion published in the official reports the court took us into its confidence, in stating that not

only was there a failure at times to have consultation, but that the presence of the entire court was not permitted.

When once definite conclusions have been reached, satisfactory to each discerning mind, that is all that can fairly be asked, but less than this no people can be asked to accept. When such a conclusion has been reached, and especially where the record shows how many and which of the judges concurred therein or dissented therefrom, the sooner it is made public the better. It is no objection to this course to say that when a re-hearing is had it will be embarrassing to change the decision, because the difficulties should be conquered in reaching a conclusion, and only upon the gravest consideration should the result be changed. If the immediate promulgation of decisions shall have the effect of giving greater caution, this will be an additional reason why the opinion should be put out as soon as announced.

When a re-hearing is necessary to correct some matter of law or fact to the prejudice of the party, that re-hearing should be asked for, and it will be asked for, without limit or number, as long as there is believed to be a hope of final victory. The only check or curb to that tendency in the Supreme Court of the United States is that the court gladly corrects an error when apparent, but meantime it publishes its conclusions at every stage as soon as reached, but this is done after careful sifting by each of the judges, and rare indeed is it that this court is compelled to rise to that height of moral grandeur as to say: "We have made a mistake on this record, and now correct it as follows."

When a re-hearing is asked, ample time should be allowed to get the matter carefully before the court, and thirty days is not too long for that purpose.

We submit upon the matters specifically referred:

That opinions should be given to the public as soon as announced, but they should not be announced until every member of the court has passed upon the case.

That existing rule No. 12 with regard to re-hearing ought not to be changed.

PRESIDENT DAILEY: The Association has heard the report. What shall be done with it?

COL. ROBERT WHITE: I move that the report be received and the resolution adopted as the sense of this Association.

MR. W. P. HUBBARD: I think there is no resolution in form. Wouldn't your purpose be accomplished by moving to adopt the report?

COL. ROBERT WHITE: Very well, make it in that form.

PRESIDENT DAILEY: It is moved that the report just submitted be adopted. Are there any remarks?

MR. GEORGE E. PRICE: I move an amendment to that motion by striking out the first paragraph of that recommendation, and I do that for this reason: I do think, sir, that is a matter we should leave to the court, and I do think that it contains something of a reflection—something of an insinuation—for us to put solemnly upon our record an instruction to the court of appeals that each of the judges must consider a case before it is announced.

PRESIDENT DAILEY: Will Mr. Price let the secretary report the provisions he proposes to strike out?

MR. GEORGE E. PRICE: Yes, sir.

The secretary read the first two provisions of the report.

PRESIDENT DAILEY: Which of them do you oppose?

MR. GEORGE E. PRICE: Both of them. I think this is a matter that ought to be left to the court. I do not think it is of—

MR. W. P. HUBBARD: Do you mean it ought to be left to the court to determine whether one judge may practically decide a case, or all of them? Is that what you think ought to be left to the court?

MR. GEORGE E. PRICE: No, I do not; I think the time for the announcement of the opinions ought to be left to the court, and I think this Association has no right to assume that they do send forth their opinions without all the judges concurring or the case having been considered. I object to that and move to strike it out.

MR. NELSON C. HUBBARD: I would like to ask whether it would meet Mr. Price's views to amend the language so as to read that "opinions should be given to the public as soon as every member of the court has passed upon the case and the result has been announced"—leaving out the insinuation.

MR. GEORGE E. PRICE: No, I do not think so. I think the court ought to have the right to hold its opinions up for any reason they think is proper, and I do not think this Association should assume to instruct the court upon that immaterial matter. The question whether these opinions go out a day or two ahead is absolutely immaterial; and whether one publication will get ahead of another in publishing them is not a very material matter. I think that the animus back of this thing comes from the

publishers of these opinions. I think they have agitated it and I do not think there is any sentiment in the bar, about the announcement of opinions, that ought to be carried into a resolution here.

MR. GEORGE B. CALDWELL: It seems to me this Association cannot with propriety express the opinion as their own conviction that the Supreme Court of Appeals of West Virginia should be governed, in the announcement of their opinions and the time they should be announced, by the West Publishing Company.

MR. J. HOP WOODS: I concur in the remarks made by Senator Price. As I stated yesterday, I think this Association erroneously and improperly assumes a state of facts, in respect to the supreme court, that does not exist. I think it is absolutely true that before any case is decided by the Supreme Court of Appeals, no matter what judge delivers the opinion, every member of the court reads and considers the record. It seems to me that this Association takes improper action when it assumes that the court of appeals does not do that thing which the constitution says it shall do. Now, my private opinion publicly expressed is that this Association criticises the Supreme Court of Appeals entirely too much. (Tremendous applause by Mr. George B. Caldwell.) Mr. President, that applause from Brother Caldwell did me as much good as the "Amen" in an old-fashioned Methodist meeting.

PRESIDENT DAILEY: And is probably more familiar to you. (Laughter.)

MR. J. HOP WOODS: For my part I want to be on good terms with the Supreme Court of Appeals. I happen, fortunately, to know most of the judges, and have had some conversations with them, and I know from what they have stated to be the rule in respect to consultations, that this resolution and this report of the committee assumes a state of facts which I understand does not exist—that the court of appeals does not all pass upon the opinions they deliver. Now, I will not vote for any resolution that assumes that the Supreme Court of Appeals, or any member of it, does that thing which in duty it is bound not to do, when that court nor any member of it is present, nor could be present, to say anything against it. I concur with everything in that report except the mere fact that the conclusion of it is a resolution or sentiment which in some measure I think is improper.

MR. HARRY W. BAYER: If I knew that the Supreme Court of Appeals of this state openly violated the law I should vote for

this resolution; but it seems to me that it is simply a superficial matter, as the Association does not know and has no means of knowing how the supreme court acts in that matter. It does not matter how many resolutions we may pass in regard to that body, it is still left with the supreme court, and with their knowledge only, and in a way that we cannot reach it. I do not see what is the use of passing something that is worthless; therefore I shall vote against this resolution.

MR. M. F. SNIDER: One of these resolutions was prepared by myself, I desire to state—the resolution which limits the time to twenty days for making a petition or giving notice to the clerk that a petition will be filed for a re-hearing. Now, I am perfectly satisfied, and have always been, with the rule as it is now; but there was an aim on the part of the publishers, as the resolution was stated in the program, to make it ten days. I think that would be entirely too short—almost short enough to prevent any petition for a re-hearing—consequently I prepared the other resolution as a matter of compromise, but I do not insist on that now, nor do I personally desire any change in the rule. It was only for the purpose of letting the opinions go to the publishers that there was any objection to filing a petition for a re-hearing. Now I agree also with the opinion of Mr. Price—that the first part of the resolution should be eliminated. I do not think there is any necessity for it, and hope it may be the pleasure of the member of the committee who presented the report to take that from the resolution.

MR. AMBLER: I ask permission to amend the report.

PRESIDENT DAILEY: The committee asks permission to amend the report. I suppose you will let it be amended?

MR. WESLEY MOLLOHAN: I was going to make this suggestion: Why wouldn't it be proper to recommend that not the motion for a re-hearing, but the petition itself, should limit the time for filing a petition for a re-hearing to twenty days—an absolute limit—and if the petition is not filed within that time, then let the opinion go out to the publisher. But do I understand that it is the desire of the movers of this measure—

PRESIDENT DAILEY: I will state the situation: the recommendation of the committee is this: that every opinion shall be published, or may be published immediately upon its delivery, and that all the judges must have considered the case. The next proposition is that the rule now in force shall not be changed at all. Mr. Price's motion is to strike out the first paragraph of the

recommendation—that opinions shall be published as soon as rendered, and that all the judges must consider the case.

MR. B. MASON AMBLER: The committee asks unanimous consent to strike out that first paragraph, and simply say that the rule shall not be changed.

PRESIDENT DAILEY: The committee asks unanimous consent to amend its report so as to make it read as follows: "That existing rule No. 12 with regard to re-hearing ought not to be changed."

MR. HENRY M. RUSSELL: Doesn't that require unanimous consent?

PRESIDENT DAILEY: I suppose it does.

MR. HENRY M. RUSSELL: Then I want to object. I do not object to leaving out the last clause of the first paragraph. I think that would accomplish what we want and it would contain then no reflection of or intimation that the court was not doing its duty properly. Why not let it read: "Opinions should be published as soon as announced," letting the court take care of what opinions it will announce, and as soon as opinions are announced let them be given the publisher. In that case I would be willing to vote for the two resolutions together—that is, not to change the rule with regard to re-hearings; but if the first resolution is to be absolutely adopted I would not want to vote for the second, because I think the fact that a long time is given for applications to be presented for re-hearings is what prevents us from getting the opinions of the court promptly after they are delivered. Now, if the court would be willing to give us its opinions as soon as they are delivered, without regard to the fact that they may afterwards be changed if re-hearings are applied for, why, that will satisfy, I think, all demands.

MR. GEORGE E. PRICE: Will the gentleman allow me to ask a question?

MR. HENRY M. RUSSELL: Certainly.

MR. GEORGE E. PRICE: Isn't it a fact that the opinions are published promptly as soon as they are announced? Isn't the only restriction that the court does not permit its clerk to furnish them to the West Publishing Company for publication. Is there anything to prevent any person from getting a copy of an opinion rendered, and having it published if he wants to?

MR. HENRY M. RUSSELL: Yes, sir; the cost of it; we have got to pay the cost.

MR. GEORGE E. PRICE: The cost. In view of that, if that is true, will your resolution that has been offered accomplish the purpose it was intended to accomplish? Won't the court say: "Why, they are published now."

MR. HENRY M. RUSSELL: But they are not published in the proper sense; they are not permitted to be published. Now, when I am engaged—

MR. GEORGE E. PRICE: Of course they could not help being published if the West Publishing Company chooses to pay for the copies.

MR. HENRY M. RUSSELL: The clerk won't give them to it though.

PRESIDENT DAILEY: Unanimous consent being refused to the amendment of the report of the committee, I take it that it comes up on Mr. Price's motion to strike out the first paragraph, which includes the suggestion that every member of the court shall consider each case. Now, do you propose an amendment to that by striking out the last part?

MR. HENRY M. RUSSELL: Yes, sir, leave in the first part and strike out the last part of that first clause.

PRESIDENT DAILEY: Mr. Price moves to strike out the whole of the first paragraph and Mr. Russell moves to amend by striking out the last part so that it will read, "opinions shall be given to the public as announced."

MR. WESLEY MOLLOHAN: I demand a separate vote on those propositions.

PRESIDENT DAILEY: I take it that it will have to be separate.

MR. HENRY M. RUSSELL: The rule with regard to re-hearings will stand just as it is; the rule with regard to giving out opinions for publication will be changed. It seems to me that the fact that opinions are to be given out for publication will make the court a little more cautious, perhaps, than it otherwise would be in regard to looking over its opinions and agreeing upon them before giving them out for publication, and without the insinuation or suggestion contained in the last paragraph, it will accomplish all that is sought to be accomplished by the resolution as originally drawn. I therefore offer that as an amendment to the other.

MR. C. M. MURPHY: I think the object of the report has been fully explained, and after this discussion of rule 12 by this Bar Association I think the members of the supreme court, if they

will read the report of our proceedings, will have about all the information they can get from this Association on the subject. I therefore move you that the further consideration of this subject be laid on the table.

The question was propounded by the chair, and the motion was lost.

MR. WESLEY MOLLOHAN: I demand a separate vote on striking out each paragraph.

PRESIDENT DAILEY: The report of the committee stands as follows:

First, that opinions shall be given to the public as announced, and should not be announced until every member of the court has passed upon the case.

Second, that existing rule No. 12 with regard to petitions for re-hearing and requiring that they shall be filed during the term at which the decision is announced, ought not to be changed.

Mr. Price moves to amend the report by striking out the whole of the first paragraph. Mr. Russell moves to amend that motion by striking out the latter clause of it so that it shall read: "opinions should be given to the public as announced," leaving the second paragraph just as the committee reports it. The question is now upon the amendment offered by Mr. Russell.

A vote was taken, and the amendment prevailed.

PRESIDENT DAILEY: The question now recurs upon the adoption of the report of the committee as amended. There has been a motion made, I believe, to consider the two paragraphs separately. Is that not a fact, Mr. Mollohan?

MR. WESLEY MOLLOHAN: Yes, sir. What do you mean, Mr. Russell, by saying that the "opinions should be given to the public as announced?"

MR. HENRY M. RUSSELL: I thought it read "as soon as announced." That was the intention, I think.

MR. WESLEY MOLLOHAN: But it don't read that way. It was not in the resolution adopted. "As announced" means in the form they are written out.

MR. B. M. AMBLER: "As soon as"—the words were inadvertently omitted.

MR. WESLEY MOLLOHAN: But that is not the resolution.

PRESIDENT DAILEY: I rather think, as the chairman of the committee states that it was an inadvertence that those words were omitted, that those words can be put in.

MR. WESLEY MOLLOHAN: Well, I object to their being put in without it is done in legal form.

PRESIDENT DAILEY: The chair will reverse its ruling on that proposition and not put the words in.

MR. HENRY M. RUSSELL: I move an amendment then by putting the words "as soon as" in.

MR. T. S. RILEY: Don't the question come up on the amendment offered by Mr. Price as to whether or not it shall be stricken out entirely?

MR. HENRY M. RUSSELL: In order to have the report in proper shape, I move that the words "as soon as" be inserted.

PRESIDENT DAILEY: Mr. Russell moves to amend the report by having it read, "opinions shall be given to the public as soon as announced."

The motion was propounded by the chair, and the amendment adopted.

MR. WESLEY MOLLOHAN: I had the floor when the chair put the question, and I wanted to be heard upon it.

PRESIDENT DAILEY: I understood you were through.

MR. WESLEY MOLLOHAN: No, sir; I will tell you when I get through. Now what is at the bottom of all this?—

PRESIDENT DAILEY: Let me suggest that when Mr. Russell was speaking Mr. Mollohan arose and asked him what he meant by "as announced," and he said it meant "as soon as published," and when he found out it was not in there, he moved to amend and put it in.

MR. WESLEY MOLLOHAN: Yes; and I want to be heard upon that amendment.

PRESIDENT DAILEY: You were heard on it.

MR. WESLEY MOLLOHAN: I haven't addressed the chair since that motion was made.

PRESIDENT DAILEY: No; when that motion was made you hadn't addressed the chair, and the court so rules—that you hadn't addressed the chair on that question. You were never on the floor on that proposition.

MR. WESLEY MOLLOHAN: Can I do it now?

A VOICE: We object to a re-hearing.

MR. GEORGE E. PRICE: It seems to me that Mr. Mollohan

was standing there addressing the chair when he was interrupted by the vote being taken.

PRESIDENT DAILEY: It was just as I stated awhile ago. Mr. Mollohan arose merely for the purpose of asking Mr. Russell that question and Mr. Russell answered it and made a motion to amend. Mr. Mollohan had not addressed the chair on that. If he did, the chair didn't see him and didn't so understand and didn't recognize him, but the motion was put and carried, and I take it the only way to get back to it is by a motion to reconsider.

MR. WESLEY MOLLOHAN: But when the chairman put that motion I was standing on the floor, and I had appealed to the chairman on that question and asked to be heard. Just as soon as you announced the resolution I said "Mr. Chairman;" and notwithstanding that I had addressed the chair in that way some parties in the audience hallooed "Aye." I have no right to address the chair, it seems.

PRESIDENT DAILEY: If the chair failed to recognize Mr. Mollohan on the question when he was on the floor, it was the chair's mistake and he regrets it; but the Association has voted and he cannot overrule it.

MR. NELSON C. HUBBARD: I move that the vote be reconsidered by which the resolution was amended by inserting the words "as soon as."

MR. GEORGE E. PRICE: I do not think we can afford to cut off debate. If a member of the Association is on the floor and wants to debate a question or to express himself upon it, I think he should have the privilege of doing so.

MR. NELSON C. HUBBARD: Let's reconsider.

PRESIDENT DAILEY: That is just the idea. The chair does not see how there can be a debate upon that amendment proposed by Mr. Russell, in its present condition, without a reconsideration of that vote. It is for the purpose of letting a member be heard that it would be re-considered, and it is to be hoped that every member of the Association will vote for its reconsideration.

The question was propounded by the chair and the vote by which the amendment was adopted was reconsidered.

PRESIDENT DAILEY: The question now is upon the amendment of Mr. Russell to insert the words, "as soon as." Mr. Mollohan has the floor.

MR. WESLEY MOLLOHAN: Now, I do not desire, Mr. Chairman, to raise any technicality in the consideration of this matter. If I should do it, Mr. Russell's motion is out of order, because the resolution was adopted by this Association, and the only way that matter could be thereafter changed would be by a motion to reconsider the vote by which the resolution was adopted in its original form.

PRESIDENT DAILEY: Let me interrupt you there, Mr. Mollohan.

MR. WESLEY MOLLOHAN: I say I do not desire to press that point.

PRESIDENT DAILEY: I was going to say to Mr. Mollohan—

MR. WESLEY MOLLOHAN: I did not raise that point.

PRESIDENT DAILEY: But I want the Association to understand how the question is. Mr. Russell made a motion to amend by striking out part of the first paragraph, and it was stricken out; then the other had not been adopted and it was of course in order to propose an amendment to what was left of it.

MR. WESLEY MOLLOHAN: Let it go; let's get to the merits of the thing. Now, I cannot conceive the object of this resolution —why it is insisted that the opinions of the court, as soon as announced, should be published, regardless of whether there may be petitions for re-hearing or not, and that they shall be forced out into the public prints. That would put us in a remarkable position; that an opinion would be published by the West Publishing Company and bound in their reports and would apparently stand there as the opinion of the court of appeals.

MR. W .P. HUBBARD: Wouldn't the reconsideration be also bound?

MR. MOLLOHAN: Then subsequently comes out another opinion as to the law of the case, utterly repudiating the previous opinion.

MR. W. P. HUBBARD: That would be according to the facts, wouldn't it?

MR. MOLLOHAN: Now, instead of having it in that condition, the bar would get what was the authoritative and distinct law in that matter in the final opinion. Now, Mr. Hubbard's question reminds me of something I once heard and it was this: Some cow-boys out in a Colorado town went into a saloon (where none of us go) and killed the barkeeper.

A VOICE: Which none of us do.

MR. MOLLOHAN: And they wanted to cover up the act; so they went to a lawyer (who I do not suppose was ever a member of this Association) and he suggested to them that the proper way to do was to have a coroner's jury called—to go to the sheriff and ask for a coroner's jury. They went to the sheriff and asked for a coroner's jury. They went to the sheriff and demanded the coroner's jury, and he said: "Yes; we will summon one." "Well," they said, "we are very good men to serve on it and you can just take us." The sheriff made up a coroner's jury out of the cow-boys, and they sat there trying to render a verdict that would acquit John of the killing of the barkeeper, and they devised various schemes, and finally one man said: "I suggest that we render a verdict of this kind: that John killed the barkeeper because the barkeeper insulted John's wife.". Another one spoke up and said: "That won't do; John hasn't now and never did have a wife." The other one then said: "Well, that don't hurt it as a reason; that is a question of fact." So, as Mr. Hubbard says, ain't it a question of fact?

MR. W. P. HUBBARD: No, I said would not the publication of the two opinions be according to the fact and let the public know, as it has a right to know, that the court had said one thing and then said another.

MR. WESLEY MOLLOHAN: What good would that do?

MR. W. P. HUBBARD: It would do this much good: the court would be a little more careful about what it said the first time.

MR. GEORGE E. PRICE: Mr. Hubbard, wouldn't it have this effect: Wouldn't it probably have the effect of preventing the getting of a re-hearing the next time?

PRESIDENT DAILEY: The gentlemen are out of order, interrupting the gentleman so much.

MR. W. P. HUBBARD: I submit that is not the case when I am called on by a gentleman who is on the floor to answer a question.

PRESIDENT DAILEY: But there were two of you gentlemen on the floor at the same time.

MR. WESLEY MOLLOHAN: I remember a case which is reported to-day in our reports, where an opinion got out and was published. Every lawyer concedes that opinion to be wrong to-day, and so does the court. After it went out it was published, and the court's attention was called to it, and they wanted an opportunity to correct it; but they found out that it had been published by the West Publishing Company, and having been

published they decided that they would not change it, and it stands there to-day, admitted to be erroneous, and there has never been an opportunity yet to overrule it. Now what is there in it? My idea would be to solve this matter by limiting the time for filing petitions, not motions, for a re-hearing to twenty days. If the court should adopt a rule of that kind it would permit no petition for a re-hearing to be filed after twenty days, and then permit the opinions to go out and be published. Twenty days won't make any difference. No man is going to be ruined because he don't get an opinion of the court of appeals in twenty days. If he is, the sooner he is ruined the better. I think it would be a fair and just compromise of the whole matter, and I therefore, if I know how to do it, move that this Association recommend that the time allowed for the filing of petitions for a re-hearing—not motions—be limited to twenty days, and after the expiration of that time, as to each case, that the opinion go out for publication.

MR. J. W. VANDERVORT: Mr. Chairman, I have only a few words to say in reference to this matter.

PRESIDENT DAILEY: Just wait a minute, please. Mr. Mollohan, do you offer that as a substitute for the report of the committee?

MR. WESLEY MOLLOHAN: Yes, sir; as a substitute for the whole thing.

MR. J. W. VANDERVORT: I do not think anything would be accomplished by the adoption of a resolution of this kind. I believe the supreme court has a better idea about this than any of us have, because the only person who has reached the point at all is Mr. Mollohan, who suggested a certain proposition. Now, Judge Miller, one of the members of the supreme court of appeals, who has been here to-day, says they have already discussed a question in that body, and that is that motions for rehearing should be filed within a certain number of days. All other opinions would be published, and those should be held up to be published as the opinions should be finally announced. Now you are trying to punish the supreme court by saying that they shall announce these opinions as first rendered and shall give them to the public, and then shall prevent the supreme court from changing an opinion thus rendered by any re-hearing. What is the result of it? You will encounter a greater trouble than is now complained of, because the supreme court, after announcing an opinion, are not going to the trouble of changing it except for good reasons, as has been stated by Mr. Mollohan.

So I am in favor of laying this whole matter on the table, for the reason that I believe the supreme court will voluntarily reach a better judgment in the matter than will be accomplished by any movement coming from us. We have now come down to the very question—that rule 12 should not be changed; and why not take up the whole set of rules and say that we do not believe any of them should be changed. I move now that the whole question under discussion be laid upon the table.

MR. W. P. HUBBARD: I rise to a point of order. That motion was made and voted down, and no question has intervened since.

MR. J. W. VANDERVORT: I beg pardon; an amendment has been offered since then, to insert the words "as soon as."

PRESIDENT DAILEY: Was that since the other motion was made?

MR. VANDERVORT: Yes, sir.

A VOICE: It was reconsidered and is now before the house again.

PRESIDENT DAILEY: I believe the motion is in order, as I remember the facts.

The question was pronounced by the chair and the motion to lay on the table was lost.

MR. GEORGE B. CALDWELL: This matter that is before us is, to my mind, the most important we have had during the present session of this body. It is a matter that will come home to each and every one of us. Now the supreme court, as we have been reminded to-day, is of like flesh and blood with the rest of us. They do make mistakes, and after they have agreed on an opinion and have adhered to it for twenty-five or thirty years they themselves have corrected it. We have plenty of rulings of that kind in their cases—a good many. They do make mistakes, and when pointed out to them in a brief—I know of one case where the Attorney General of this State, in his brief, pointed out a plain statute which was not capable of any misconstruction, and the supreme court after they had adjourned for the term admitted it. They decided the case about two days before the term adjourned, and the statute was plainly called to their attention, and they gave as an excuse afterwards that they had mislaid the Attorney General's brief. Now this shows the necessity for some re-hearings, and we have found by experience, too, that such re-hearings are necessary. As to the limit placed by Mr. Mollohan, or which he would have, I am opposed to it; I am opposed to opinions being published as soon as announced, which

is the important question before this body. I am likewise opposed to the twenty days. I want to say that a man who is engaged in active practice may have during that twenty days a number of injunctions or a number of motions for new trials. It may be during a term of court where he is engaged almost daily, and it may be impossible for him to review the utterances of the supreme court. These men on the supreme bench are chosen generally from among the membership of this body, and after a justice of the peace, by administering the oath of office to them, has anointed them with the oil of infallibility, they still make mistakes, and there should be some reasonable time given in which we can ask them to correct those mistakes.

MR. HENRY M. RUSSELL: Mr. Mollohan presented a resolution as a substitute which is to the effect, as I understand it, that petitions for re-hearings must be presented within twenty days, and that after twenty days the opinions in those cases in which no application for re-hearing have been made shall be given to the public. Now, I must confess that was my idea of the right way to go about it, but I can see that you might accomplish the same thing the other way. So far as I am concerned I would be exceedingly glad to adopt Mr. Mollohan's resolution, and that will get rid of Mr. Caldwell's objection, too.

MR. WESLEY MOLLOHAN: My amendment is this: that this Association recommends that the court of appeals limit the time for filing petitions for re-hearings to twenty days after the delivery of the opinion, and that opinions in all cases in which such petitions are not filed within that time shall be given to the public.

COL. ROBERT WHITE: I move to amend that, if it is in order, by inserting "thirty" in place of "twenty."

PRESIDENT DAILEY: The motion is to amend the substitute by inserting "thirty" instead of "twenty" days.

COL. ROBERT WHITE: Now, I have been sitting quietly by, listening to this whole discussion. Mr. Caldwell is thoroughly right in what he said. My friend here who sits in this chair (Mr. Mollohan) speaks from the position of a lawyer living at Charleston, in which city most of the opinions of the supreme court are rendered. Mr. Caldwell, myself and others live a long distance from Charleston. We have no means only as the clerk drops us a card or we see it in the Southeastern Reporter—no means whatever of knowing whether our cases have been decided for us or against us, or, in our judgment, rightly or wrongly, until we get the opinion in that way. Time passes rapidly and

a few days must elapse before we can hear what the court has done about these cases. We may be engaged and most of us are engaged—

MR. W. P. HUBBARD: The list of cases decided is published in the newspapers. Don't you read the newspapers?

COL. ROBERT WHITE: To be honest, I sometimes read them, sir, and sometimes I don't. If I have got something else to do I generally do that before I read the newspapers; but my experience has been if the list of cases decided is published in that way, that we may overlook it in the hurry of reading the morning paper at the breakfast table. Now, as I was going to say, we live a long distance away and it must take more or less time for us to know how the court has decided a case—whether for us or against us. When we know it is against us we feel that we have been wronged and that we must know what that opinion is—know the basis of that opinion; therefore we have to communicate with the clerk and get a copy of the opinion, or with some counsel at Charleston, and find out the reasons of the court, and after we get them we have then to determine whether we want to apply for a re-hearing. If we are engaged in court, as Mr. Caldwell has said, or if we are otherwise busy, our twenty days as provided by this resolution, flits by and we are defeated, because of the passage of the time so quickly in accomplishing what we should be permitted to accomplish. Therefore, for those reasons, I think if we are going to adopt a resolution of this sort that we ought to make it more than twenty days. The truth of the business is I have come to the conclusion, after listening to this discussion, and to the statements of the gentlemen here, that we are trampling on the court of appeals, and I have further come to the conclusion if we are guilty of any such things as I heard stated from the mouths of gentlemen upon the floor to-day, that we had better let this matter drop and let the rule stand as it is, and lay the whole subject on the table.

MR. M. F. SNIDER: There is another reason that causes delay that perhaps the members of the bar had not thought of. Ordinarily there are about ten opinions rendered each week, when the court is in session, and the clerk to send out copies of these ten opinions, would have quite a good deal of work on his hands, consequently that limits the time even in getting an opinion from the clerk, if you wire or send to him for it, because when the court convenes and decides cases each judge hands down his opinions and with applications for copies coming in from all quarters you will have to take your turn and likely suffer from some delay. If you limit the time for filing a petition to twenty

days I think it is entirely too short. The clerk is here and I was speaking to him about this matter and he says he thinks the resolution that is offered ought not to be shorter than thirty days for petitions to be filed. Of course, if you would give notice that you would file a petition, you might shorten the time down to twenty days, but if a petition is to be filed we should not have it less than thirty days.

PRESIDENT DAILEY: Mr. Mollohan proposes a substitute for the two paragraphs constituting the recommendation of the committee. He proposes in that substitute to limit the filing of petitions for re-hearing to twenty days, and the motion is made by Colonel White to substitute "thirty" instead of "twenty." The question is on that amendment.

The amendment was adopted.

PRESIDENT DAILEY: The question now recurs on the adoption of the substitute, as amended, for the recommendation of the committee.

The substitute as amended was adopted.

MR. W. P. HUBBARD: It only applies to that part of the report. The rest of the report stands as amended by that substitute, and I suppose the question now comes up on the adoption of the report as a whole.

COL. ROBERT WHITE: I move that it be adopted as amended.

A MEMBER: I move that it be laid on the table.

PRESIDENT DAILEY: The motion is made that the report be laid upon the table.

The question was propounded by the chair, and the motion to lay upon the table was lost.

PRESIDENT DAILEY: The motion is now upon the adoption of the whole report, with this substitute, instead of the recommendation of the committee.

The question was put and the motion carried.

On motion of Mr. J. W. Vandervort the Association then took a recess until 2:30 p. m.

SECOND DAY: AFTERNOON SESSION.

The Association re-assembled at 2:30 p. m., and was called to order by the President.

MR. GEORGE B. CALDWELL: I have the honor to report, on behalf of the Committee on Admissions, the name of Mr. William E. Glasscock, of Morgantown. This gentleman is a member of

the local bar association at Morgantown, and I move that the secretary cast the ballot of the Association for Mr. Glasscock.

The question was propounded by the chair, and the motion prevailed.

Thereupon the secretary announced that he had cast the ballot for the Association as directed, and Mr. Glasscock was duly declared elected a member of the Association.

PRESIDENT DAILEY: The secretary has received a letter from Mr. MacMahon, who was appointed a delegate to the American Bar Association, which might be read.

The secretary read the letter from Mr. MacMahon.

PRESIDENT DAILEY: The next order of business is the report of the Executive Council, which I will have the secretary read, it having been sent to the desk.

The secretary read the report, as follows:

REPORT OF EXECUTIVE COUNCIL.

To the President and Members of the West Virginia Bar Association:

The Executive Council respectfully refers to the elaborate program of this meeting as an evidence of its activity and interest in the affairs of the Association.

Once a month, also, throughout the year, it has furnished such additional evidence of its industry, aid, and comfort as may be gathered from the pages of the journal of the Association—THE WEST VIRGINIA BAR. An edition of 650 copies is issued monthly, and these reach, we believe, nearly every law office in the state, and the leading law libraries of other states. An effort has always been made to keep the expenses of the journal fairly within its income. For three or four years past it has been self-supporting. The treasurer's report for the current year will show the amount collected on account of THE BAR and the amount paid for printing. Outside of this, $124 has been collected from subscribers who are not members of the Association and $80 on advertising accounts, leaving a balance to the credit of THE BAR, after paying all expenses, of $112.05.

In order to preserve the life and equilibrium of the Association, the council has adopted the following amendment to the by-laws of the Association:

22. Any member of this Association who has dishonored the draft of the treasurer for his annual dues for two successive years, shall be dropped from the roll of membership by the treasurer; and if at the end of one year thereafter he shall still be in

default for dues, his membership shall thereby be forfeited. The treasurer shall report his action under this by-law to each annual meeting of the Association.

The next annual meeting will be the twentieth anniversary of this Association, and if it is deemed desirable that it be celebrated in any special manner, the Executive Council might be so instructed; and any suggestions or instructions that the Association may make can be given during the present session. The Association will be entitled to representation in the Congress of Lawyers at the St. Louis Exposition; and delegates should therefore be appointed during this meeting.

W. P. WILLEY.
HENRY M. RUSSELL.
C. D. MERRICK.
C. W. DAILEY, President.

NELSON C. HUBBARD,
Secretary.

PRESIDENT DAILEY The only important feature of that report, probably, to which attention ought to be called, is the enactment by the council of the by-law that refers to delinquent members. If no motion is made, that will become a part of the by-laws of the Association. The next order of business coming over from yesterday, is the report of the Committee on Grievances—Judge Jacobs.

JUDGE T. P. JACOBS: Mr. President and gentlemen of the Association:—The first part of the report of the Committee on Grievances will be entirely verbal and will consist of complaints lodged against my colleagues on that committee. There are four of us and I am the sole representative of the commission. We stand up in the Bar Association and talk pleasantly upon the subject of professional ethics and so on, but when it comes down to solid work I observe that my colleagues in this particular instance have failed to show up. This remark applies to all the commission with one exception. Mr. E. P. Rucker, ex-attorney general, is absent on account of sickness.

Mr. President and Gentlemen:—The Committee on Grievances has had before it one matter and have written a report upon it. There were certain charges and specifications filed in this case which I suppose I might as well read to the Association for its information.

Judge Jacobs then read the report of the committee, as follows:

REPORT OF COMMITTEE ON GRIEVANCES.

To the West Virginia Bar Association:

The Committee on Grievances begs leave to make the following report:

On the — day of November, 1903, Mr. Nelson C. Hubbard exhibited before the committee certain charges and specifications alleging against Mr. V. B. Archer unprofessional conduct in his relations and associations with Mr. J. J. Coniff in the conduct of certain phases of litigation against certain striking miners before the Honorable J. J. Jackson, United States Judge; those charges and specifications were served upon Mr. Archer on the 15th day of December. And on the 29th day of December, Mr. Archer, with his counsel, Hon. C. T. Caldwell, and also the complainant appeared before the committee at the place and time indicated, and Mr. Archer submitted his answer in writing to the said charges, and certain documentary evidences were also submitted at the same time and the parties fully heard. Mr. J. J. Coniff was not before the committee.

Your committee reports that the ground of grievance is certain language contained in an address made by Mr. Archer before Judge Jackson in his application to have the prisoners in that litigation released. It appears to the committee that during the summer of 1902, a certain trust company, a non-resident corporation, obtained an injunction from Judge Jackson restraining Hagerty and others from interfering with the operations of the coal company mentioned in the litigation. It also appears that for a violation of the injunction Hagerty and eleven others were arraigned before Judge Jackson on a rule charging them with the violation of said injunction. On the hearing on the rule Mr. V. B. Archer and Mr. Coniff appeared as counsel for the prisoners. No question of the jurisdiction of the court to grant an injunction was then or there raised upon the hearing upon said rule. Hagerty and other prisoners were convicted of violating the injunction, and were sentenced to jail, where they were incarcerated. Later it appears that Mr. Coniff obtained from Judge Nathan Goff a habeas corpus, which was heard before Judge Goff at the city of Clarksburg, and upon that hearing Judge Goff refused to release the prisoners but remanded them.

The committee is informed that Mr. Coniff there insisted upon the want of jurisdiction of the federal court to grant the injunction in that case. Judge Goff held that the United States court had jurisdiction and refused to interfere. The case was reported in Federal Reporter, Volume 124, page 441. Mr. Archer had no

connection with the habeas corpus case and was expected to have none. Sometime after the disposition of the habeas corpus case, Mr. T. L. Lewis, national vice president of the United Mine Workers of America, who was acting as the advisory and next friend of the mine strikers, asked Mr. Archer to assist him in procuring the release of the prisoners, then still being confined in jail; at that time, the evidence before the committee shows, Mr. Archer gave Mr. Lewis to understand, and the miners through him, that he could not consent to make any effort of the kind unless the jurisdiction of the United States court to grant an injunction in such cases should be fully conceded; and it also appears that Mr. Archer declined to make any effort in that direction unless there was some assurance in advance that the application would be received and considered; it appears also that Mr. Archer and Mr. Lewis visited Judge Jackson, where it was understood that if the proper application for clemency was made it would be considered.

Thereupon Mr. Archer alone as counsel for the prisoners prepared, signed, and his clients signed a petition to Judge Jackson asking for the relief and appealing to the court purely and alone for the clemency of the court, being of the opinion that the ends of justice had already been subserved by the incarceration of the prisoners.

No question of the jurisdiction was raised in that application for clemency; and Mr. Archer gave his clients to distinctly understand that no attack could or would be made upon the jurisdiction of the court.

Pending the incarceration of the prisoners incendiary, violent and threatening articles were published in various newspapers throughout the country in the interest of the miners, assaulting Judge Jackson, and in many cases threatening him, denying his jurisdiction, and in effect declaring him to be an usurper.

The committee is informed that various communications were sent to Judge Jackson, threatening personal violence on account of his action in the proceedings; and that such threats went to such extent, that as the committee is informed, the Department of Justice detailed a certain officer to secure the safety of Judge Jackson.

These remarks are preliminary to the discussion as to what occurred upon the hearing for a discharge. At the time of a hearing on the application for release and clemency on the part of Judge Jackson, Mr. Archer made an argument which to prevent, as he says, misunderstanding, he reduced wholly to writing. In that address which he read to the court on the appeal

for clemency, Mr. Archer used very strong language in denunciation of the various articles published throughout the country which had criticised Judge Jackson as an usurper and without jurisdiction, and denounced those who had written him threatening letters, and disclaimed for his clients any participation in such acts or any approval of the same. And inasmuch as various papers, notably, The Commoner, had assaulted the jurisdiction of the court to grant injunction in such cases, Mr. Archer took a very strong ground in favor of the general jurisdiction in courts of equity to exercise jurisdiction by way of restraining strikers to prevent irreparable damage and mischief. The remarks of Mr. Archer on the question of general jurisdiction of the court of equity to grant injunction to restrain irreparable damage constitute the gravamen of the offense charged against him.

Mr. Coniff, the committee learns, raised the question of jurisdiction of the habeas corpus case before Judge Goff; and it is of the opinion that the misunderstanding which led to the filing of the charges grew out of a misconception of Mr. Archer's remarks and their application. Mr. Archer's address to the court sustained the jurisdiction of the court to grant injunction in proper cases. Mr. Coniff in the habeas corpus proceedings attacked the jurisdiction of the court in that particular case. Mr. Archer's remarks in his address to the court are not at issue with Mr. Coniff's position in the habeas corpus proceedings. On the spur of the moment, and at the conclusion of Mr. Archer's argument, Mr. Coniff took some exception to Mr. Archer's remarks under the impression that they were antagonistic to his views and position in the habeas corpus proceedings. Whereupon Mr. Archer disclaimed any intention to reflect upon Mr. Coniff, and disclaimed that his position was any way antagonistic to Mr. Coniff's position; at this Mr. Coniff seemed to have been satisfied. The committee is of the opinion that Mr. Archer's remarks made on the question of jurisdiction were not at variance, from his standpoint, with the position taken by Mr. Coniff in the habeas corpus proceedings, and he endeavored to make it clear to Mr. Coniff at the time. Mr. Archer then and since disclaimed any such intention to antagonize Mr. Coniff. His printed remarks before the committee are susceptible, it seems, to no construction which would antagonize the position taken by Mr. Coniff in the habeas corpus proceedings.

The committee sees no impropriety in the act of Mr. Archer accepting sole employment on the petition for clemency. Mr. Archer had not been counsel in the habeas corpus proceedings;

he was given to understand by Mr. Lewis, the friend and counsel of the miners, that he was alone to prepare the petition and make the application to Judge Jackson. Mr. Archer has made it clear to the committee that the only contention he made on the application before Judge Jackson on the question of jurisdiction was that a general jurisdiction existed, and did this to refute the incendiary statements printed throughout the country, but he did not intend to claim that Mr. Coniff was wrong in his position before Judge Goff; as that particular case did not confer jurisdiction. The committee thinks that Mr. Archer's argument which is before it is not susceptible of that construction.

The only other matter complained of is his reported interview with the newspaper reporter. The interview was before the committee, and so far as the interview reports Mr. Archer's history of the case, that his remarks were not open to criticism. If he stated to the reporter, as he is reported to have stated, that Mr. Coniff had failed, he was but stating the fact, for it is apparent that Mr. Coniff had failed in his habeas corpus proceedings. Mr. Archer disclaims any intention to do Mr. Coniff any injury by making such statement, and the statement was the fact, and he still persists in disclaiming any such intent.

The committee repeats that it is of the opinion that the misunderstanding occurred on account of the misconception at the time of remarks made by Mr. Archer to the court on the question of general jurisdiction of a court of equity. It regrets the necessity of having to report upon this question; at the same time commends the disinterestedness of Mr. N. C. Hubbard, who had the personal courage to bring the matter he conceived to be unprofessional to the attention of the committee, although it turns out upon investigation it was without ground.

Your committee therefore finds that the charges and specifications exhibited against Mr. Archer are not sustained, and are dismissed.

Respectfully submitted,

THOS. P. JACOBS, Chairman.

JUDGE T. P. JACOBS: In order that you may have a proper understanding of the report, I shall also read some extracts from the Parkersburg Sentinel of August 12, 1902, taken from Mr. Archer's written argument on that occasion. (Judge Jacobs then read the newspaper extracts referred to.) The constitution requires that the committee make some recommendation in cases of this kind when they submit their report. The committee therefore reports the following:

Resolved, That the report of the Committee on Grievances be approved; that the charges against V. B. Archer be dismissed and that he be exonerated therefrom.

MR. J. W. VANDERVORT: I move the adoption of the resolution that has been submitted by the committee. I do not know that it is necessary to make any extended remarks in reference to the matter. Of course we all regret that any differences should have ever occurred between two lawyers practicing at the same bar, but such things will happen. I remember that it has frequently happened in my practice. At one time I had an older partner who was a lawyer of great ability, and sometimes in the heat of the moment he would shove the responsibility of some particular transaction off upon the younger member of the firm who would always try to bear it bravely. Mr. Archer and myself in practice have nearly always been on opposing sides, and if there has been any feeling at all it has probably been one of antagonism that is apt to arise between two men combating against each other in some contest, so that there is no special feeling that has arisen by reason of our relations that would cause me to receive and favor the adoption of the report; but I feel that I would like to do the man justice when that man himself has stated before the committee that he had no personal intention of doing a fellow member of the bar a wrong. We should be willing to give the man credit for the statement made when it is uncontradicted. I am sure by anything I have said I do not either intend to criticise Mr. Coniff, or to criticise Mr. Hubbard for undertaking to defend a brother of his own profession. This is a time when the year is just closing, when the finer feelings of men's natures, I think, should always be uppermost, and I think Mr. Coniff and Mr. Archer can possibly reach across whatever chasm of difference has existed between them, with friendly hands extended to each other; and I hope what we may do in the future will simply be to strike a little stronger the blows that weld the chain of union that binds the profession together.

MR. H. H. MOSS, JR.: Mr. President, I second the motion.

The question was propounded by the chair, and the resolution offered by Judge Jacobs from the Committee on Grievances was adopted.

PRESIDENT DAILEY: The next order of business on the program is a paper to be read by Charles E. Hogg, of Point Pleasant, on "The History of the English Court of Chancery." Mr. Hogg not being here, I suppose the next matter to which the Associa-

tion had better devote its attention is the nomination and election of officers, which seems to come next, and after that there is some miscellaneous business that might be taken up, if we have time.

ELECTION OF OFFICERS.

The election of officers was held with the following results:

PRESIDENT—W. W. Brannon, of Weston.

VICE-PRESIDENTS—First District, Harvey F. Smith, of Clarksburg; Second District, Ira E. Robinson, of Grafton; Third District, E. L. Nuckolls, of Fayetteville; Fourth District, J. W. Vandervort, of Parkersburg; Fifth District, Clark W. May, of Hamlin.

SECRETARY—Nelson C. Hubbard, of Wheeling.

TREASURER—W. N. Miller, of Parkersburg.

EXECUTIVE COUNCIL—W. P. Willey, of Morgantown; B. M. Ambler, of Parkersburg; Henry M. Russell, of Wheeling; C. D. Merrick, of Parkersburg; Dr. St. George T. Brooke, of Morgantown.

DELEGATES TO THE AMERICAN BAR ASSOCIATION—Wesley Mollohan, of Charleston; J. W. Vandervort, of Parkersburg; Colonel Robert White, of Wheeling.

DELEGATES TO THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS, AT ST. LOUIS—Henry M. Russell, of Wheeling; Judge T. P. Jacobs, of New Martinsville.

ALTERNATES—B. M. Ambler and J. W. Vandervort, of Parkersburg.

Charleston was chosen as the place where the next annual meeting of the Association shall be held.

MR. W. N. MILLER: I want to repeat the announcement I made at the noon recess—that the Wood County Bar Association has provided for the annual dinner at this hotel, and all persons who have not already been provided with tickets will please make application to me for them, and I will gladly furnish them. The dinner will be served at 7:30 p. m., and the members are requested to meet on the parlor floor a few minutes before that time.

MR. W. P. WILLEY: I want to make the announcement that the Executive Council having been directed to appoint a committee to prepare a report on the Torrens System for the next session of the Association, has selected the following committee: Judge T. P. Jacobs, of New Martinsville; W. P. Hubbard, of Wheeling; James F. Brown, of Charleston.

MR. W. P. HUBBARD: I feel obliged to decline serving on that committee. I do not come within either category as provided for in the resolution raising that committee. I am not one of those disposed to favor the project nor am I as yet disposed to oppose it.

PRESIDENT DAILEY: Mr. Hubbard declines to serve on that committee and the Executive Council will have to fill the vacancy caused by Mr. Hubbard's declination.

MR. JAMES C. FRAZER: In its migrations over the state it has been the good fortune of this Association to always meet with a warm welcome and a hearty invitation to return, but I am certain, Mr. President, that the members of the West Virginia Bar Association must feel that never have they been welcomed more freely, nor entertained more graciously, and never has the sense of obligation rested more heavily upon the members of the Bar Association than it has at the hands of our good brothers of the Wood County Bar Association. Without further preamble I move, therefore,

1st—That the thanks of the West Virginia Bar Association be extended to the Wood County Bar Association for its magnificent welcome and continuous entertainment.

2d—That to the good people of Parkersburg whose homes are not warmer than their hearts and whose welcome has been so freely extended to us,—that the thanks of this Association be extended to them.

3—That the thanks of this Association be extended to the management of the "Hotel Chancellor" for their thoroughness and their kindness in providing for all our wants, needs, and comforts.

4th—That our thanks be extended to the railroads for their courtesy in the matter of providing us with transportation at reduced rates.

5th—And finally, that the thanks of the West Virginia Bar Association be extended to the press of the city of Parkersburg for their kindness and very full reports of the proceedings of this meeting.

The question was propounded by the chair and the motion carried.

PRESIDENT DAILEY: So far as I know this completes the business of the Association, unless some one wants to bring up something under the miscellaneous business head.

On motion of W. P. Willey the nineteenth annual meeting then adjourned.

APPENDIX

Address of the President.

Recent Legislation and Decisions in West Virginia.

C. W. Dailey, of the Elkins Bar.

Gentlemen:

When I could no longer escape facing the fact that by reason of your kindness in electing me President of this Association, I was bound by the constitution (the only thing I think that could have bound me) to read an address on this occasion, I somewhat hastily concluded that I would, in a way profitable if not interesting, call your attention to new legislation of importance, or striking for any reason, and in addition call to mind any recent decisions of our court of last resort which might appear to overrule old cases or principles or to be worthy of special notice for any reason; or, in other words, to call attention to any comparatively recent legislation of importance either by the legislative body which sits at Charleston once every two years for a limited time, or by our Supreme Court of Appeals which sits at least three times a year as long as it pleases, and therein has a great advantage over the other body for—doing good.

Having reached that conclusion, I felt as though my work was done, except merely jotting down (after looking them up) the remarkable, striking, and important things which had been done by the two tribunals named, and which had likely escaped the attention of other members of the bar as they had my own. When the jotting-down time came at last, as it will sometimes come, even to the man who acts upon the wise proverb, "Never do to-day what you can put off till to-morrow," I started gaily to collect, as I thought, the more striking and important instances of the character heretofore mentioned with which to entertain, if not enlighten you.

The field, on exploration, did not appear so inviting as I expected to find it, and but for the fact that different members of the bar, some of whom are here to-day, had a right to expect an expression of *their* views of certain cases kindly furnished me, I would have sought some other field, notwithstanding "the day was far spent and the night coming on." One member of this Association suggested that I notice the case of Moore vs. Mustoe, but that member must know that I live over near the Happy Land of Canaan and am now a neighbor to "Pa" Mustoe, who by the way is generally considered, I believe, a very respectable man, who has preached, and as most of his neighbors believe, practiced, the Gospel, fully up to the light which has been given him. I am obliged to my fellow-member of the bar for that suggestion, *but I cannot discuss that case.* I venture to mention it only out of my great consideration for the brother from whom the suggestion came.

Returning now to my original purpose, let me say that some of the comparatively recent Acts of our Legislature in which we are much interested are to be commended, some others it is well for us to be acquainted with, some strike one as a little peculiar, and one or more as probably unnecessary.

This Association, the bar of the state, the people at large, and especially the twenty-six fortunate gentlemen who shall after January 1st, 1905, preside in the circuit courts and grace the bench of the court of appeals, are to be congratulated at the fairness and the degree of liberality, shown by the legislature at its last session, in fixing the salaries of the judges so near to figures recommended by this Association at its last meeting. This action of that body may be taken, I think, as showing a growing confidence in the integrity and singleness of purpose of this Association, which I am sure will continue to grow as the Association grows older, wiser and better. That it will grow *older*, like its several members, I know, and that it will grow wiser and better I feel as confident; for as it grows in years new blood will be continually flowing into it, in new and younger members of the bar, who, with better advantages than many of the older members have had, should be wiser and better men, and consequently better prepared to carry on the work.

It remains to be seen, however, whether the members of the bar throughout the state will show their appreciation of this confidence on the part of the legislature, by making every possible effort to place upon the bench only men worthy of the position, and consequently worthy of the salaries paid.

Whether the requirement that at least four terms of court shall be held yearly in each county is wise, may well be doubted. With this requirement it would seem that at least one term should by statute be confined to chancery business, and the court clearly authorized, if not required, to hear oral testimony in such cases. In addition to this, would it not be an advantage to give the circuit judge power to hear and decide causes and enter decrees therein, in vacation, upon reasonable notice, or at least when all parties interested and represented by counsel desire to submit the same?

The bar is further indebted to the legislature of 1903 for its amendment of Section 1 of Chapter 132 of the Code, relating to sales under decrees, which requires every special commissioner, after all the purchase money is paid, to make a full report showing his disposition of the fund. It might have been even better had the act required a report after the collection and disbursement of each payment.

This is already the practice in some circuits; and is much better than the practice in other circuits of retiring the case upon confirmation of sale, when it is never heard of again, unless, or until, some unfortunate feels that he has cause of complaint against some special commissioner for failure to account for the fund.

In this Act the legislature may have gone too far in requiring the report to be entered of record in the chancery order book, rather than making it sufficient for the court to approve it and to show by its decree the substance of the report or at least the distribution of the fund. This is probably all that was intended, but the language used is unfortunately not the best to express such intention.

It is to be hoped that the court of appeals will by construction amend this statute in practice, as it has done the 9th section of Chapter 131 of the Code, authorizing a bill of exceptions to be signed by the judge in vacation within thirty days after the adjournment of the term, where the language used is: "The court may, in vacation, within thirty days after the adjournment of the term make up and sign any bill of exceptions and certify the *same* to the clerk of the court, who shall enter it upon the order book of such court." In practice it has never been required by our

court of appeals that the bill of exceptions should be actually recorded, and when it happens to be a bill of exceptions containing all the evidence taken down in short-hand and written out in long-hand, the litigant who has to pay the cost should be thankful that the court of appeals can amend an Act of the legislature just simply by its practice, and all the rest of us should be equally grateful. This practice in the case of a bill of exceptions is right by analogy to the practice when the exceptions are made up and the bill signed in term time.

Since the legislature, many years back, provided in Section 2, Chapter 124 of the Code that any process might be executed on or before its return day, and since the court of appeals *not* many years back, in the year 1891, in the case of Spragins, Buck & Co. vs. Railroad Company, 35 W. Va., page 139, construed that statute to mean that the process might also be *issued* on the same day, we are indebted for Chapter 10 of the Acts of this year, providing that a plea in abatement may be filed as late as "the next succeeding rules after the rules at which a rule to plead or a conditional judgment is entered," and providing further that such plea may be verified by the agent of the defendant. The practice was getting to be too common to bring suit or action, or to have the process served on the return day (when a plea in abatement would be available), relying upon the improbability of the defendants being able to file such a plea at the first rules.

When it is admitted that the Act of the legislature of 1901, authorizing the recovery of damages for the breach of any written contract in an action of assumpsit, was a wise step, we have gone, it would seem, far enough in unstinted praise of the legislature.

Opinion will be divided as to the propriety of Chapter 42 of the Acts of 1903, amending Section 3 of Chapter 75 of the Code, relating to mechanics' liens. Under the law as it stood before this amendment, any mechanic, laborer or material man wishing to hold the owner and his property (when he had not given the notice before beginning work that he would look to the owner) was obliged to furnish the owner within thirty-five days an itemized account of work done or material furnished, and the laborer, mechanic or material man lost his lien as to any item not within thirty-five days. The legislature of 1903 did not intend that its act should be construed away, and therefore after making the enactment proceeded to state how it should be construed. It provides that the statement shall be furnished the owner within thirty-five days after the labor "is performed or material furnished," which shall mean, says the act, that the laborer, etc., shall have thirty-five days "after he shall have ceased to have performed labor" (exact words of statute), etc., to give such notice, and that it may cover any item within nine months. The draftsman of this bill had evidently read the case of Cushwa and others vs. Development Co., 45 W. Va. 490, in which, as Judge Dent in a vigorous dissenting opinion shows, the court had, in its opinion, construed the words "shall have been performed" to mean "shall have been commenced," and in drawing his bill made it clear that "shall have been performed" should mean what we ordinarily interpret it to mean, namely: completed or finished,—and not commenced. It should not mean within thirty-five days from the beginning of work, but thirty-five days from the end. Now we have a singular situation. The words" shall have been performed" construed by the court to refer to the commencement of the work, are still in this amended section in the very connection in which the court construed them as aforesaid. In another part of the same section, substintially the same words are used in another connection but about the same lien, and the legisla-

ture says they shall not be construed to mean "shall have been commenced," but shall mean "shall have been completed or finished." Now, where are we? Cushwa vs. Development Company has, as far as I know, never been approved. The position of Judge Dent in that case has, I think, commended itself to the profession, and will likely in the end be established as the law in such cases. It is hard for one to believe that Judge Dent had given the full force of his views as expressed in that dissenting opinion to the other members of the court before the final announcement of their decision. At any rate the legislature has used practically the same words construed by the court, to mean exactly the opposite of the meaning given by the court. It is to be hoped, however, that the legislature may not find it usually necessary to construe its own acts.

Chapter 37 of the Acts of 1903, relating to roads, is worthy of note as an adroit attempt to take private property for private use and evade the decision in Varner vs. Martin, 21 W. Va., page 534, to the effect that the act of 1872-3, providing for private roads, was in violation of the constitution, as well as other cases holding that private property cannot be taken for private use under the idea of a general benefit to result therefrom. This evasion (I use the word without the idea of improper motive, for want of a better term) is attempted, while the individual to receive the peculiar benefit is to pay, or may be required to pay, the expense and keep up the road established for his benefit. It cannot well be long before the constitutionality of the act is tested.

There are some other recent acts that might be noticed under the general idea with which this paper was started, but to notice them all would be an imposition on the Association. I must, however, ask your indulgence while I call attention to two recent acts.

One is Chapter 136 of the Acts of 1901, being a compulsory school law for the counties of Brooke and Hancock, and practically establishing a very peculiar inferior judicial tribunal for the trial of offences under the law. The general terms of the law are similar to the general compulsory school law of the state. The first section provides for trial before a justice and prescribes the fine to be imposed. The second defines the offense, and prescribes certain things that shall excuse the accused, *provided* they are *shown* to the *satisfaction of the teacher*. The justice tries, the teacher decides. Is the tribunal provided for or authorized by the constitution?

The other act would appear to be wholly unnecessary. It is Chapter 44, Acts of 1903, which is offered to the voters of every county in the state if they choose to adopt it, making it a criminal offence for any one "to *pursue* with *intent* to *catch*" any skunk or pole-cat. This is somewhat important, as the first step in this state towards the enactment of laws making attempted suicide a criminal offence.

Before leaving this subject of legislation, it may be said, that with humane societies and agents, reformatories, compulsory school laws, truant officers, and teachers exercising judicial powers, and a late act making it criminal to dispose of property to hinder, delay or defraud creditors, some old-fashioned people are asking the question whether in a little while one will be able to do anything for himself, or whether a man will be having any authority in, or control of, his own family or over his own property. If anyone thinks such questions without reason let him study with some care the acts of recent legislatures, especially the last two.

Turning now to the court of appeals, we will find some of its comparatively recent decisions not without interest. The case of Tower's Adminis-

trator vs. Whip has given in this state an "open door" to all of the evils that result from the testimony of hand-writing experts, by holding that when the genuineness of the signature to a note or other paper sued on is brought in question an expert on hand-writing may compare the signature to the paper with another admitted or proved signature of the defendant and give his opinion as to whether the two were written by the same person.

That this is contrary to the law as we have had it in this state since Rowt's Admnx. vs. Kile's Admnr. in 1829, reported in 1 Leigh, is admitted in the opinion in Tower vs. Whip. The member of the court delivering the opinion says:

"In West Virginia it is settled law that the genuineness of an instrument cannot be proven or disproven by comparison with other writings." You see now how unstable "settled law" may be. That the weight of authorities outside our state may be in accord with this late decision of our court may be admitted, and the argument in favor of the position, especially as put by Judge Brannon, appears strong.

The case of Moore vs. United States, 91 U. S., and other authorities are cited to the effect that at common law an exception to the rule against comparison of hand-writing was that the *jury* might compare the hand-writing of a paper proved or admitted to be that of the party whose signature was in question, and in the case for any other purpose, with the signature to the paper in question; and the argument is made that if this comparison may be made by the jury, surely they may be aided by having an expert point out the characteristics that show the signatures to be similar or different. Unfortunately for this argument in this state, there was introduced in evidence for another purpose in the Rowt case a paper proved to have been signed by the defendant, and the lower court instructed the jury that they should not compare it with the signature in question for the purpose of determining whether both were written by the same person.

It is to be supposed the jury obeyed the court. The lower court was affirmed in that particular.

The rule laid down in the Rowt case has been approved in several cases in our state. In State vs. Koontz, 31 W. Va., Judge Woods, after reviewing the Virginia and West Virginia authorities, speaking for the court, says: "From the rule established by these authorities in Virginia and in this state we have no desire to depart."

This made the rule "settled law" in West Virginia. If the law was unwise, illogical, or bad in its effects, it should have been overruled, as was done in Tower vs. Whip. There are many, however, who will question the wisdom of the change and will feel as the court did when the Koontz case was decided in 1888.

The case of Phares vs. Holt, Judge, and of Hutton vs. Holt, Judge, &c., the former reported in 51 and the latter in 52 W. Va., are worthy of note chiefly because they construe a very important feature of Section 46 of Chapter 125 of the Code. In these cases it is held that a judgment entered at rules in a case in which there is no order for an inquiry of damages becomes absolutely final on the last day of the succeeding term of the court, whether any judgment is actually entered by the court or not, or whether the plaintiff has asked for the entry of a judgment, or whether an affidavit has been filed with the declaration or not; that while it is necessary for a formal judgment to be entered to make the judgment effective, or to authorize the issuing of an execution, defence cannot be made at a later term, and that the court must enter up judgment at any later term upon

the plaintiff filing an affidavit such as is mentioned in the section (if one was not filed with the declaration) or proving his claim before the court; that the plaintiff by not asking for the entry of a judgment at the first term will not be assumed to have waived his right to have a judgment enteed without any chance for the defendant to make defence; that the reasoning of the court in Hunter vs. Snyder's Exors., 11 W. Va. 208-209, as to waiver was not applicable under the statute as amended and now found in our Code. The question involved was a nice one, under the present statute; the opinion of the court delivered by Judge Brannon is forceful, and will well pay for the reading of it.

Both the cases referred to were mandamus proceedings to require the judge of the circuit court to enter up judgment in the respective cases upon affidavit filed with the declaration. The case of Hutton vs. Hutton, an action of debt on a note, had gone over to the third term after the rules without any appearance in court by either plaintiff or defendant. At the third term the defendant tendered a plea of res adjudicata, averring that the debt sued for had been decreed by the plaintiff in a chancery cause and had been paid, accompanied by an affidavit that at the two preceding terms the defendant had failed to appear and plead, because of an agreement between himself and his counsel, and the plaintiff and his counsel, that the case should go over without any action being taken and without prejudice to the rights of either party, with a view of compromising their differences —in fact that their respective rights should be preserved just as though the defendant had appeared and entered a plea.

To the filing of this plea and the affidavit the plaintiff objected and asked for judgment. The lower court overruled the objection and allowed the plea and affidavit to be filed, thus passing judicially upon the sufficiency of the plea and the defendant's right to make defence at that time. Thereupon the plaintiff applied to the court of appeals for a writ of mandamus to compel the court below to enter up judgment upon his affidavit. Upon the hearing, the court decided that the court below erred in allowing the plea to be filed, that the defendant had lost his right to make defence, that the plaintiff's office judgment had become final, that the defendant could not make any defense, that plaintiff had not waived his right to insist upon the finality of his judgment. While the court refused to award a peremptory mandamus, because it found the affidavit defective, it did hold that the court must as a matter of course enter up the judgment upon a proper affidavit being made.

It should be said that the court did not in its opinion notice the affidavit filed with the plea explaining the non-appearance of the defendant, and it must be taken for granted that it was considered of no weight, at least in a court of law.

This case is noticed, not for the purpose of criticising the opinion, or of questioning the correctness of the conclusions reached by the court (for I am not prepared to do either), but to call attention of the bar to the important question involved, and to call attention also to what would seem at first blush to be an enlargement of the province of the writ of mandamus, and to how well it seems to serve the purpose of a writ of error.

Admit that, had the court below simply refused to enter the judgment, mandamus was the proper remedy, does it seem that it was the remedy when that court refused to enter the judgment because in the exercise of its judicial powers it had allowed a plea in bar to be filed? Is it plain that it was the remedy, when in commanding the ministerial act of enter-

ing judgment (if that was ministerial) it was necessary to review, and, in effect, reverse the action of the court in the exercise of strictly judicial powers?

If you are inclined to feel reasonably certain (as did counsel for the defendant Hutton) that mandamus was not the proper remedy, read the opinions in both cases, and you will not be so certain. To an orderly mind, however, the record of the circuit court in one of these cases, showing at one term the filing of a plea in bar, and at the next term a judgment entered on affidavit filed with the declaration, would come as something of a shock.

The case of Null vs. Elliott, decided September, 1902, and reported in 52 W. Va., holding that one who buys standing timber on the land of another, with the right to remove it within a limited time, cannot cut any timber after the time has expired; and that the timber then standing remains the property of the land owner as part of the land, is important as settling with us for the first time, presumably for all time, a question of great importance in our state about which lawyers differed. The reason for the holding as given in the opinion is that the time limit is a condition of the sale and not a covenant, and that the purchaser becomes the owner of only so much of the timber as he severs during the time given. In other words, that the standing timber is the property of the land owner and becomes the property of the purchaser only when it is severed. The conclusion reached in this case will, I think, be generally approved by the bar. The reasoning of this opinion would seem to be at variance with the practice throughout the state of taxing or assessing the standing timber in such cases to the purchaser.

I will not be bound by the statement in the foregoing paragraph that the question involved in the case under consideration is settled for this state, because in reading the opinion further I find that Judge Dent, in excusing himself from venturing beyond the absolutely necessary, says: "No one without divine foreknowledge can foretell what the future conclusions of the court may be, under change of time, quantity, quality, and circumstances." The learned judge as usual cites a few very applicable authorities to sustain this somewhat vigorous statement.

After this and after Tower vs. Whip, Judge Dent's distinguished associate, Judge Brannon, will probably be more careful in speaking of "settled law" in West Virginia.

To the citation of cases in pairs for contrast by Judge Dent to sustain his views as to the instability of the court's conclusion, might well be added the cases of State vs. Burnett, 47 W. Va., holding that a special judge must take the oath of office prescribed by Section 5 of Article IV. of the constitution, and Tower vs. Whip, which in addition to laying down a new rule of evidence, holds that a special judge need not take that oath and overrules State vs. Burnett.

On the whole, Tower vs. Whip will be received favorably by the bar. A majority will likely endorse the departure from the old land-marks as to the rule of evidence, while those of us who doubt the wisdom of that will join with the rest of the bar in bidding a cheerful good-bye to Burnett's case. The Tower case was tried before a special judge. One can hardly escape the feeling that it is a little hard on a special judge, who receives no salary as a compensation for wounded feelings, to be reversed for adhering to the "settled law" of the state binding upon him, by a court which the settled law does not control.

The truth is, we are forced to agree with Judge Dent that nothing is

settled; we can't tell what conclusions will be reached "under change of time, quantity, quality, and circumstances."

We all change our opinions as to what is law. *We* change probably oftener than the courts and the judges. Some say (I am not of the number) that we have to change *quick and often* to keep up with the courts.

The judges are generally better lawyers than the rest of us; they should be. They have so many good lawyers to teach them. I admit a change of my own opinion on one question of law, as the following will show:

Some fifteen years ago I instituted in the circuit court of Mineral county an action of debt in the name of M. C. Totten vs. Sanford Whip, on a note, the genuineness of which Whip denied. Whip filed several pleas which he signed and swore to. I compared the signatures to the pleas with the signature to the note (I think I had the right to do that even as the law then stood), patted myself on the back, and in my ignorance of the "settled law" in this state, said: "Now, Mr. Whip, these new signatures are in the case. I can prove to the jury by any expert that the man who signed these pleas signed the note, and in addition the court will instruct the jury to compare the signatures to the pleas with that on the note."

That case hung on till both parties died, and its style became Tower, Admr. of Totten, vs. Whip's Admr., and my mistaken idea of the law is now made correct. Generally it is the young and unlearned lawyer who, with the aid of the courts, unsettles old law and makes the new. Once in a while it is the bold lawyer knowing the law, but seeing no good reason for it (as was the case with the gentleman who fell heir to Totten vs. Whip) who leads the court to discard the old and adopt the new.

Yes, we all change our views. The difference between us and the courts of last resort is we have to change our views to conform to the law as we find it to be, while they change the law as they find it, to conform to their views.

Many lawyers at least among those over near the "Happy Land of Canaan" held the view that the reservation of title upon the sale of goods and chattels was not effective as against creditors and purchasers without notice, unless notice of such reservation was not only recorded but was also acknowledged for record, until the decision of Hatfield vs. Hambert, 51 W. Va. 190, holding that "notice of the reservation of title until property is paid for, under Section 3, Chapter 74, of the Code, is not required to be acknowledged as a prerequisite to recordation." While this came as a surprise to many of us, although we had never thought of having an acknowledgment to a *lis pendens* before filing, the conclusion reached in Hatfield vs. Hambert appears clearly right, and the reasoning upon which it is based is clear and convincing. This case has been approved by Troy Wagon Co. vs. Hutton, 44 S. E. R. 135, and the points decided therein may be accepted as the "settled law" in this state.

Since everything in this paper heretofore has been commendatory of our Supreme Court of Appeals, may attention now be called to one or two particulars in which it is thought a little more care and head work would be of benefit.

Section 5, Article VIII. of the Constitution, speaking of the Supreme Court of Appeals, says: "It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case." We all know something of the thought, labor and care exercised

by the judges of our court soon after the adoption of our present Constitution, to carry out that requirement. At times we might have been inclined to complain that the whole opinion was embodied in the syllabus, but on the whole the work was entirely satisfactory. On the other hand, we all know that for some years past we are perplexed, troubled and in doubt as to what part of opinions to accept and act upon as law, because the syllabus fails to embody what the opinion seems to establish as law. Some members of the bar insist that the syllabus is the law and all the law of the case. This hardly seems correct. The opinion adjudicates the case and the points arising in it. The syllabus is to *show* at a glance what the opinion has established. If this is not done it does not follow that the points adjudicated in the opinion are not law, but merely that the court has failed to discharge *a duty imposed upon it by the Constitution.* Where the syllabus and the opinion appear to differ (could such a case be found) the situation is more difficult; but I suppose we must settle the difficulty by concluding there is no inconsistency, because the court *must know* what it has decided, and in the syllabus has said what that is.

The late case of Hanmem vs. Hill, from Grant county, 52 W. Va., will serve to illustrate the mild complaint made as to the failure of the court at times to embody in the syllabus the points adjudicated. By the way, this case was heard below by a special judge. He must have taken all the oaths, as no question was raised. The lower court was reversed. There are three points of the syllabus. The first refers to the "settled" rule that the granting or refusing to grant a continuance is in the sound discretion of the trial court, and on that question the lower court will not be reversed unless its action was clearly erroneous. On this point the lower court was in fact sustained, as we would gather from the statement of the point. The second point embodies the recognized doctrine that the lower court will not be reversed for error in admitting or refusing to admit certain testimony when it is plain that the plaintiff in error could not have been "injured" thereby. On this point the lower court was not reversed. The third and last point of the syllabus is, that where plaintiff claims to have been injured by a telephone wire which had been allowed to lie across a road in such a way as to catch a horse's foot in passing, it is not competent to prove the condition of the wire months after the injury. One reading the syllabus and knowing that the case was reversed would naturally suppose that it was on this point. Upon reading the opinion, however, we find this was an affirmation of the lower court. On what point or points then was the case reversed? For this you must read the opinion. You will find them. One seeking light on the very question upon which the lower court was reversed would never read this opinion after reading the syllabus. May we not ask, without being unreasonable, that the syllabus give at least the points upon which the lower court is reversed?

An interesting study will be to find out just the effect of the decisions of the court made on that part of Section 9 of Chapter 131 of the Code requiring the court upon any question involving the evidence to consider *all* the testimony, whether conflicting or not. This statute at first seemed to be taken simply at what it says; the evidence was considered whether on a motion to exclude, motion for a new trial, or on demurrer to the evidence, and ever since the court has in practice held it applicable in any and all of these cases; but every now and then the individual judge gives expression to his individual opinion that possibly its application has been extended too far; and you will notice a growing tendency to so construe it, or rather to so apply it as to make it but little, if any, in advance of

the old rule to exclude all of the appellant's or demurrant's evidence that conflicts with that of the appellee or demurree.

Long before this requirement became part of the statute it had become the practice of the lower courts to certify the evidence instead of the facts proven, leaving to the appellate court the burden of reading all the evidence and excluding from consideration all the evidence of the appellant conflicting with that of the appellee. The statute requires the *consideration* of all, and as a necessary result the *weighing* of all, and as a part of the process the passing upon the *credibility* of all, as it may be gathered from the record. It may be said that one reason for the old rule was that the jury was the sole judge of the credibility of a witness, and therefore conflicting evidence was rejected. If in applying the statute we are to assume that the jury is the sole judge of credibility of witnesses under this statute we will soon be back to the old rule in effect. In considering this evidence it is submitted that the court of appeals should assume the credibility of all the witnesses (unless there is something in the record to impeach it), and then give to the testimony of each witness its fair and reasonable weight. In some of the cases this would seem to be the view of the court. In others, there is an intimation that the jury, where there is conflicting evidence, might not have credited certain of the testimony, and consequently the court is powerless. This we submit is to do away with the statute. Two cases on this statute have been called to my attention: Johnson vs. Bevens, 39 W. Va., and Maple vs. Johns, 42 W. Va. Read them and the dozen or more other cases on this subject, and it will be seen that the court or the judges seem to be at sea on this simple statute directing that all the evidence be considered in any case involving the evidence whether on a motion for a new trial "*or otherwise.*" Strangers to the court itself and its several members, reading the statute and some of the opinions, might almost conclude that the court was seeking some avenue of escape from the duty laid upon it by the statute.

Just here this paper stops, with the feeling on the part of the writer shared by all the hearers, that it is already too long.

Report of the Committee on Legal Education.

Your Committee on Legal Education begs leave to report that the standard of legal education has been greatly raised in West Virginia within the last ten or twelve years. That this Association may know the reasons upon which the committee passes its opinion, it is necessary to call attention to a few facts which have brought about this result. These facts are (1) the establishment of the law school at the West Virginia University, and (2) the order of the supreme court of this state requiring all applicants for admission to the bar to appear before the law faculty of the university and undergo the same examination that the law class would be required to pass before they could obtain the degree of Bachelor of Laws. As these two facts are intimately related to each other in raising the standard of legal education, a brief but separate statement may be made as to each. Passing over the early history of the law school from its establishment in 1878 and its steady growth, despite hostile influences both without and within, it may be remarked that for a number of years its diploma did not admit the holder to practice until he had undergone an examination by three judges. The candidate for admission to the bar could either attend the law school, and perhaps take his diploma and then subsequently pass his examination by three judges, or he could appear before the judges in the first instance and take his examination by them without having attended any law school whatever. But it should be observed that not the slightest English education was required to render the applicant for admission to the bar eligible for the examination. In case of the law school, however, the many examinations were always in writing, and an opportunity was accordingly afforded the professor to judge of the candidate's rudimentary English education; besides, during the course of nine months at the university, the personal association with the student gave the professor an opportunity to judge of the student's general culture; but the examination before the judges was oral, and it sometimes happened that the judges had never seen the applicant for license to practice law until he appeared for examination. Accordingly the applicant might have the inveterate habit of spelling the personal pronoun "I" with a small "i," taking especial pains to dot the "i," or "England" with a small "e," and the judges had no opportunity to discover that pernicious habit. There are learned and able lawyers who believe that no examination into the intellectual fitness of applicants to practice law should be required. Certainly, under the former system of examination by the judges, these gentlemen had all that they could desire. Practically, and as a matter of fact, there was no examination at all worthy of the name as to either the rudimentary English education, the legal attainments, or the moral fitness of the applicant to practice a high and responsible vocation. As to the merits of these opposing views as to what should be required of an applicant for license to practice law, this committee is not called upon to say anything. For years this Association labored to secure an Act of the legislature requiring higher attainments in candidates for admission to the bar; and at last it was successful. As the result of this Act of the legislature, and of the action of the general faculty of the West

Virginia University, there are now five modes of obtaining admission to the bar of this state; three by attending the West Virginia University law school and successfully standing the examinations; one by appearing before the law faculty at the stated period and successfully standing the examination without having attended the West Virginia University law school. In this last case he may or may not have attended some other law school and he may or may not have graduated in the other law school; he may have read law in a lawyer's office, or he may have read law at home all by himself; but he must have read law somewhere for a period of two years, but no preliminary test whatever is required of his rudimentary English education to render him eligible to the examination. (5) The fifth method of obtaining admission to the bar of this state is where a practitioner has been admitted to practice in another state in which he is a bona fide resident at the time of admission with no intention at that time of removing to West Virginia; but he does subsequently remove into this state with the intention of residing therein. In this case he may be admitted in this state on mere motion to the court.

We will take up these several modes seriatim:

(1) The course which leads to the degree of Bachelor of Laws.

In speaking of courses in the university we must understand a course to represent the amount of work done by a class meeting five times a week for one quarter, of twelve weeks. The recitation or lecture lasts one hour, but of course that does not include the work which the student has done at home in his own room studying his text books and the last lecture in preparation for the next meeting of the class. To enter the Bachelor of Law course the student must have had the following high school work; viz.: nine courses of English, that is, three years of nine months each in a class that has met for one hour a day, five days in the week, six courses in Latin, six courses in mathematics, and two courses in history, making twenty-two courses in all. These are absolutely prescribed. Besides these, however, he must select thirteen other courses out of fifty-six, making thirty-six courses before he can be admitted to the college academic department. The thirteen elective courses might be three additional courses in Latin, making nine courses or three years of Latin all together, six courses (two years) of French and six courses (two years) of German. He is now prepared to enter the college department of the university, but he is not yet prepared to enter the law department for the degree of Bachelor of Laws. He must have more "culture;" for this Association should understand that the authorities at one time in the ascendancy in the university thought very little of the study of law as a means of cultivating the intellect; therefore, to save the university from disgrace, the law student who leaves the university with the degree of Bachelor of Laws must have "culture." Having completed his thirty-six courses of preparatory culture, he must now have twenty-two courses of college "culture." These twenty-two college courses were all elective; that is, the student might select them from the entire range of subjects taught in the university. Accordingly he might select: the history of the Bible, one course; botany, one course; chemistry, one course; economics and sociology, one course; education, one course; English language and literature, one course; Germanic language and literature, one course; Greek language and literature, one course; European history, one course; American history, one course; Latin language and literature, one course; mathematics, one course; oratory and elocution, one course; philosophy, one course; physics, one course; political science, one course; rhetoric, one course; French, two courses; Italian, one

course; zoology, one course. The student who completed these fifty-eight courses of academic "culture" is now prepared to enter the law class and compete for the degree of Bachelor of Laws. Supposing the student to have taken eleven courses in each of the scholastic years of nine months (and that is the maximum allowed in the West Virginia University) he has had more than five years of high school and college work before he enters the law department; and of course this does not include his elementary education in the common schools. This preliminary "culture" before being allowed to enter for the degree of Bachelor of Laws is very much higher than what is required for the same degree at the university of Virginia, Washington & Lee, Yale, or, it is believed, any other college or university in the United States, except Harvard, which requires an academic degree. Having now prepared himself to enter for the degree, he now has before him twenty courses of law. These twenty law courses will occupy him two years. They are as follows, viz: nine months (three courses) of the first three books of Blackstone on the Rights of Persons, the Rights of Property and Private Wrongs, i. e., Torts; one course of contracts; half a course of agency; eight weeks of criminal law; four weeks of negotiable paper; four weeks of bailments; four weeks of guaranty; three months of criminal procedure; three months of international law; three months of civil and criminal evidence; three months of corporations; three months of common law pleading and practice; six months of equity and equity pleading; three months of constitutional law; three months of real property; six weeks of sales; six weeks of partnership; three months of torts; three months of damages, and six months of moot court practice, making in all a full course of two years under three law professors.

(2) We come now to the course for the Diploma of Law.

This differs from the course for the degree of Bachelor of Laws only in the amount of academic preparation that is required to render the candidate eligible. To enter it he must have had twenty-four academic courses of three months each in a class that meets one hour a day for five days in the week. These twenty-four courses of preliminary education may be stated thus, viz: six months of English grammar (two courses); fifteen months of English composition and rhetoric (five courses); nine months of elementary algebra (three courses); twenty-seven months of Latin (nine courses); three months of American history (one course); three months of English history (one course), and three months of mediaeval history (one course). Having now qualified himself to compete for the diploma of law he may enter the law school. His law courses will be exactly the same as those which are required for the degree of Bachelor of Laws.

(3) This brings us to the third mode of entering the profession of law in West Virginia through the door of the university.

As is well known to this Association, in the year —— the legislature passed an Act giving to the supreme court of the state the power to pass whatever rules the court thought proper for admission of candidates to practice law in West Virginia. In accordance with this legislative act the court passed an order requiring all applicants for license to practice to appear before the law faculty of the university and stand the same examinations to which the faculty would subject students of the law class who were applicants for the degree of Bachelor of Laws. In pursuance of this order of the supreme court, the faculty requires that the candidate shall furnish evidence that he has read law somewhere for two years. The examinations last for three full days and are held three times a year.

But there are absolutely no educational requirements to render the applicant eligible for the examinations. The examinations, however, are all written, and this affords the law faculty full opportunity to judge of the rudimentary English education of the applicant. If the written papers show lack of elementary English education a heavy discount is made against the candidate, and sometimes he has been rejected altogether on this account. The order of the supreme court did not require that the applicant should have attended any law school, but the order has had that effect. It was found impossible to comply with the court's requirement that applicants should be subjected to the Bachelor of Laws examinations. First, the candidate for the degree, during his two years law course, is subjected to thirty-six examinations and perhaps to two or three personal quizzes in class every week throughout that entire time. The result of these examinations and quizzes is that the professor gets a personal knowledge of the student and of his attainments which he could not possibly have of a stranger who presented himself for the first time for examination. Besides, if the stranger candidate were subjected to the equivalent of the thirty-six examinations he would be kept in Morgantown for ten days or two weeks. It would be impossible, also, to give the stranger applicant the equivalent of the numberless quizzes to which the regular student is subjected in the course of the two years. It was found also that the student at all law schools is taught an amount of legal theory and legal history for which some practitioners have a contempt, and which, it is believed, none teach their pupils in their law offices. For example, the chairman of this committee has never examined a student from a lawyer's office who could explain the difference between the English statute of uses and the West Virginia statute, or what limitations would be a use in England but a trust in West Virginia, or Sergeant Moore's invention of the two deeds of lease and release, or the development by judicial decision of the action of ejectment from a personal action of tort to a mixed action for the recovery of the title to freeholds with damages for their detention; nor has any student ever appeared from a lawyer's office who had even heard of the celebrated question whether the statute of charitable uses (27 Elizabeth) was a remedial or a declaratory statute. But this familiar and elementary knowledge is to be found in such familiar and elementary books as Blackstone's Commentaries and Minor's Institutes. The law faculty, therefore, was bound to decide whether they would lower the grade of the examination or reject every student who had not been to a law school. The faculty decided that it was best to lower the grade of the examination so as to let students from law offices into the profession rather than offend the sensibilities of those members of the bar that had never been to a law school and therefore held all law schools in contempt, but had become fine lawyers nevertheless. One of these able and eminent lawyers, in his address as President of this Association, in its meeting at Martinsburg, spoke disparagingly of the law school at the university. Another equally eminent lawyer told the chairman of this committee that he did not think the arrangement made by the supreme court had accomplished any good. Nobody was more surprised at the action of the supreme court than the law faculty. It had not occurred to one of them that the court would take such action. The faculty did not admit the right of the court to increase the faculty's labors without the faculty's consent, and especially without increased compensation. The faculty was not within the jurisdiction of the court, and the court had no power whatever over it. For years the law faculty did this extra work

without any compensation and solely because they thought it was the desire of the bar that they should do it. A couple of years ago the legislature provided that each candidate for admission to the bar should pay $5 for being examined; but this $5 has to be divided between three after deducting the expenses of printing, postage, &c. The $5 fee does not nearly compensate the three members of the faculty for the labor and responsibility of the examination. If the sentiment of the two lawyers to whom reference has been made is shared by any considerable number of the Association, the law faculty would be pleased to have the Association induce the supreme court to change the arrangement.

Notwithstanding the lowering of the grade of examination for admission to the bar, the effect of the order of the supreme court has been to send students to the university law school to attend lectures as a preparation for the bar examination. These students are called special students, which implies that they are not candidates for either the diploma or the Bachelor of Laws degree. They enter the law class like other law students and have the same instruction in law, but as they are not applying for either the diploma or the Bachelor of Laws degree, or any other college honor, their studies are not divided into junior and senior, and they are allowed to take any subjects which do not conflict as to the time of lectures. When the regular examination in course for the diploma or degree of Bachelor of Laws takes place these students are permitted to stand that examination on that particular subject, and if they pass that examination they are credited with that particular subject in the subsequent bar examination. They frequently fail to pass the bar examination. They are then allowed to appear at a subsequent examination and try it over again. Some have returned three or four times, and some have been so discouraged that they never did return. Some of those who failed held degrees from universities; others had attended university law schools but had not graduated. If the Bar Association will hold up the hands of the law faculty the time will come when no man will be able to gain admittance to the bar of this state except one who is well grounded in elementary legal principles. Whether he will have the brains to apply those principles in practice the law faculty can not guarantee.

It may be remarked at this place that there are law students at the university who are studying law without any intention of ever becoming practitioners. The university allows those of her students who are candidates for the academic degree of Bachelor of Arts to take one course in constitutional law, one course in international law, and three courses in Blackstone's Commentaries, embracing the first three books, which treat of the Rights of Person and of Property and Torts; and these five courses in law will be counted toward the degree of Bachelor of Arts. This is an admirable arrangement, for every educated American ought to have not only some elementary knowledge of the law relating to his rights of person and rights of property and of the injuries to those rights, but he should at least have enough knowledge of constitutional and international law to form a definite and intelligent opinion of the lawfulness of the action of the United States towards Panama and Colombia. Knowledge of this kind is quite as important to the American citizen as a knowledge of Greek and Latin. It will be observed that the law students at the law school of the West Virginia University are composed of four distinct sets, all of whom sit in the same classes and hear the same lectures if they are taking the same subjects. These sets are the candidates for the degree of Bachelor

of Laws, the candidates for the diploma, the special law students, and the candidates for the purely academic degree of Bachelor of Arts.

(4) We now come to the fourth mode of admission to the bar of West Virginia, viz: where the applicant for license to practice appears before the law faculty of the university at one of the stated periods and passes his examination without having attended the West Virginia University law school. In this case he may or may not have graduated in some other law school; he may have read law in a lawyer's office, or he may have read law at home all by himself; but he must have read law somewhere for a period of at least two years. But no preliminary test, even of his rudimentary English education, is made or required by law to render him eligible for the examination. Some of these young gentlemen have spelled the personal pronoun "I" with a small "i," and England with a small "e," and some have crued ideas of law. The chairman of this committee asked one of them on examination: "What was the wife's paraphernalia?" His answer was: "Tins, pans, kettles, and such like things as properly appertain to a woman." He was indignant that he did not pass his examination, went to a western state, was there admitted to the bar, returned to West Virginia, and one of our own judges carried West Virginia's courtesy to the western state so far as to admit that young man to practice. It is fair to add that when the chairman of this committee last heard of that young man he was a brakesman on a railroad. But this case illustrates the necessity for the statute of 1901 which stops such evasions of the law for the future. It may be an open question in the first instance as to whether there should be any examination of any kind required for admission to the bar. We may believe, if we choose to do so, that no more examination as to fitness should be required of a man who desires to practice law than is required of a man who desires to sell dry goods. But as the law does require an examination, that examination should not be a farce, nor should any man be allowed to dodge it.

(5) The fifth mode of gaining admission to the bar of West Virginia is where a man was regularly and lawfully licensed in another state, when he was a bona fide resident of that other state, with no intention at the time of his license to change his residence into West Virginia, but he does nevertheless subsequently come into West Virginia permanently to reside. In this case he may be admitted on mere motion to the court. This suggests the question as to whether it would be wise either to require the lawyer in another state, who proposes to change his residence to West Virginia, to have practiced for a certain number of years in that other state, or to make him also undergo an examination, no matter how long he had practiced in the other state. On the one hand, if the lawyer who has obtained his license in another state is allowed to come immediately into West Virginia and practice on that foreign license, it might be difficult to prove that he did not intend to move into West Virginia at the time he got his license in the foreign state. On the other hand, to require Richard Olney or Isador Rayner to go before the law faculty of the West Virginia University and undergo an examination before being allowed to practice in West Virginia, if either or both should remove into our state, would seem to be absurd.

Report of Committee on Legal Biography.

Of the gentlemen of the bar of West Virginia who signed the call for the meeting at Grafton, at which this Association was formed, July 8th, 1886, nearly one-half have passed to the other side.

Many, Oh! how many noble men have gone from us "down amidst the shadows and the darkness." Ambition, success, honor, love, devotion could not stay the hand of the invincible Conqueror. With bowed heads we have submitted to His inexorable decrees.

During the year just coming to its close, six of our number have fallen before the fatal sickle; one just ready for the fruitage of his high ideals of the profession, John R. Swiger, of Clarksburg; three who had reached life's meridian, to fall as ripening grain in the harvest, Marcellus M. Thompson, of Clarksburg, O. L. Holliday, of Moundsville, and W. S. Wiley, of New Martinsville, and two cut down in the sere and yellow leaf—men, whose devoted lives as citizens, lawyers, statesmen and jurists, will pass in history to the forefront among their compeers in this young commonwealth, Judges Edwin L. Maxwell and Okey Johnson.

These have all gone from us since last we met. Ah! is it not true that the "hush and solemnity of death become intensest eloquence, and speak with a pathos and power that are simply immeasurable."

Okey Johnson! Who will ever forget him? Of kind and genial disposition; a heart bounding with warmest impulses; a companion whose society we loved; a friend who was a friend indeed; a man among men; a lawyer learned, and a judge strong and incorruptible.

Okey Johnson has passed across that mysterious valley which separates the seen from the unseen; summoned to the home of the immortals, and it is fitting that this Association should make record of its respect for the memory of him, whose life, character and work left deep impress upon the bar and the state.

Judge Johnson was born in Long Branch, in the county of Tyler, March 24th, 1834, and was brought up upon his father's farm, working in summer and attending a country school in the winter. In his twenty-first year he entered the high school at Marietta, Ohio, and in June, 1856, graduated from that school. Being ambitious to rise and make a high mark in life, he entered the law school at Harvard, and in the year 1858 received the degree of LL. B.

He commenced the practice of his profession in his native county; but in May, 1862, he removed to Parkersburg, and there met with success. In the year 1864 he gave his first public service as an elector upon the ticket which bore the name of Gen. Geo. B. McClellan at its head as a candidate for the Presidency.

In the year 1870 he became a candidate for the State Senate in a district which theretofore had given a large majority against his party, but after a successful canvass he carried every county in the district. Unfortunately his health gave way under the strain through which he had passed, and he could only remain in his seat for two weeks. But in those two weeks his labors were crowned by the passage of that amendment which gave relief to the then disfranchised of the new state.

He was elected to the constitutional convention of 1872 by a majority of over two thousand.

Trained as a lawyer under such men as Theophilus Parsons, Emory Washburn and Joel Parker, he met with success at the bar and took a very prominent part in framing the present constitution of our state.

In 1876 he was elected judge of the supreme court and entered upon the tenure of that office January 1st, 1877. He served his full term of twelve years, and for seven and one-half years was President of that court. He sat upon the bench with Green, Haymond, Moore, Patton, Snyder and Woods, all of whom passed to the beyond before him.

The opinions delivered by Judge Johnson, whilst he was upon the supreme court bench, numbered about three hundred, and were contained in twenty-two of the Reports, running from the Tenth to the Thirty-first. The first opinion ever written by him, being in the case of Lockhart and Ireland against Beckley, upon the subject of fraudulent conveyances, has been frequently cited, and the doctrine therein promulgated was eventually incorporated in later text books as one of the true rules for determining fraud. How clearly he stated in that opinion his conclusion that "fraud is to be legally inferred from the facts and circumstances of the case." An able writer, commenting upon that opinion, said that "the rule for detecting the cunning devices of fraud, as thus laid down, was new, and is a safe principle to follow in practice."

He decided many cases involving constitutional questions, and in every instance wherein his opinion was reviewed, his judgment was sustained. The writer knew him well, and knows whereof he speaks as to a number of cases he argued before that able court and in which Judge Johnson delivered the opinions, among them the cases known as the "War Trespass Cases," in which the doctrine of the belligerent rights of the soldiers of the south was involved, and which was forever settled by the Supreme Court of the United States in the case of Freeland against Williams, reported in Volume 131 of the United States Reports; a decision fraught with great results and carrying with it peace to many a heart and home, and like oil upon the troubled waters of war calmed their rushing tide; and also the case of the Chesapeake and Ohio Railroad Company against Miller, Auditor. In this case, Judge Johnson held that the clauses of exemption from taxation found in the original charters of railroad companies were unconstitutional, and in which the Supreme Court of the United States afterwards held (114 U. S. Rep., 176) that such exemptions were personal privileges and not transferable, and from that day to this railroads have been assessed with and paid taxes.

The case of the Town of Ravenswood against Flemming (22 W. Va., 52) was another case of public importance in which, Judge Johnson delivering the opinion, it was held: that "riparian owners of land on the Ohio river, as against the state of West Virginia, hold their titles only to ordinary high water mark," and that "the bed, banks and shores of the Ohio river are held by the state in trust for the public." Other cases might be mentioned did time permit.

Retiring from the bench, January 1st, 1889, Judge Johnson entered upon the practice of his noble profession with success. Afterwards he became dean of the law school at the West Virginia University, where his work was well done among the young men of the state, who loved him much. He once was President of this Association.

He died on June 16th, 1903, in the city of New York, after a surgical operation had been performed.

Judge Johnson was over six feet in height, of massive build, and possessed of great physical power, which enabled him to undergo long continued activity of mind and to fight well, hard and successfully the battles of life.

Could not Judge Johnson, when about to submit to the surgeon's knife, have looked back over his hard-fought and well-spent life, and said truly with a Scottish poet:

"My race is run;
And soon, amidst the ever silent dead
I must repose, it may be half forgot,
Yes! I have broke the hard and bitter bread
For many a year, with those who trembled not
To buckle on their armor for the fight
And set themselves against the tyrant's lot,
And I have never bowed me to his might
Nor knelt before him; for I bear within
The sternest consciousness of right,
And that perpetual hate of gilded sin,
Which made me what I am; and though the strain
Of poverty be on me, yet I win
More honor by it than the blinded train
Who hug their gilded servitude, and bow
Unto the weakest and the most profane.
Therefore, with unencumbered soul I go
Before the footstool of my Maker, where
I hope to stand as undisturbed as now."

Another distinguished lawyer, legislator and jurist was suddenly taken in February last, in the city of Charleston, whilst there as the representative of the county of Harrison in the legislature then in session.

Judge Edwin Maxwell was born in Weston, in the county of Lewis, in the year 1825. His father had selected his own occupation, that of a carpenter and housebuilder, as the life-work of his boy, but that boy had high ambitions and ideals. He learned well his lessons in the country school, and caught the moments of his young life as they passed, and used them well.

Those who knew him intimately and best, his daily associates at the bar in Clarksburg, met on the day following the sudden demise of Judge Maxwell, and adopted a tribute to his memory, which tells in language more eloquent and touching than your committee can, the story of his life. That tribute is as follows:

Judge Edwin Maxwell departed this life at Charleston, West Virginia, on February 5th, 1903, at eight o'clock p. m., while serving as a member of the legislature. He was a native of Lewis county, this state. He began his career as a lawyer in the year 1848, having been admitted to the bar of Harrison county on the 1st day of June of the year. He practiced law successfully, principally in the counties of Harrison, Doddridge and Lewis, until the year 1866, having served one term in the legislature of West Virginia during this period as a member of the Senate. In the year 1866 he was elected to the bench of the Supreme Court of Appeals of this state, where he served with distinction until the 1st day of January, 1873. His opinions upon the bench were distinguished for sound judgment, strong common sense and clear discernment of legal principles. Upon his return to the bar in 1873, he resumed the practice of his profession with the advantage gained by his experience on the bench added to his previous store

of legal knowledge. His views of legal questions were sound, and his opinions were always entitled to great weight by reason of his ability to discriminate and to draw correct conclusions of law from any given state of facts. He served one term in the legislature of the state, that of 1888-9, after leaving the bench, and was an unsuccessful candidate for Governor in 1884.

In the practice of his profession he was straightforward and upright, always recognizing it to be the duty of a lawyer to deal honestly with his client, and avoid involving him in litigation in a doubtful case. In private life he was honest and in his conduct exemplary. His career of more than half a century as a lawyer and judge was distinguished, and his example was one that may be held up as a pattern for all those who are of his profession.

The journals of the two branches of the legislature tell how hard Judge Maxwell labored for his people and for the state, and the records of the first court of appeals of the state will bear testimony to his ability as a judge.

"He has joined the silent majority, and when we become a part of the same great throng, may it in truth be said of us also, that we have performed well our part in life."

Orton L. Holliday, who died at Moundsville, Marshall county, on the 20th day of July, 1903, was a gentleman in manner and in life, a good man, and stood well in his profession. One of the most intimate friends and associates at the Moundsville bar wrote of him: "The cause of his death was a gradual giving away of the organs of the body that sustain life. He was the son of R. C. Holliday, who was a prominent lawyer of West Virginia. His mother's maiden name was Sarah L. Lunsford. Both the father and mother belonged to prominent pioneer Panhandle families. He received his early education under Prof. N. K. Shattuck, of Moundsville, and afterwards attended Washington & Jefferson College, and graduated at the Iron City Business College in Pittsburg. He studied law under his father and became his partner, and after the latter's death, about twenty-five years ago, continued the practice in his own name. He was a director of and attorney for the Marshall County Bank for a number of years prior to his death, and served as special judge of the circuit court of Marshall county. He was prominent in the Masonic and Elk orders. He was a Republican in politics, and took an active interest in the local party management. He was a man of the strictest integrity and was universally respected."

John R. Swiger had been a member of the Clarksburg bar but a few years when death took him.

On the evening of September 13th, 1903, just when success in his chosen profession "seemed assured to him,' when his future appeared brightest and ambitions for the future were highest, he was called to answer the summons of that Court to whose mandate "he bowed."

John R. Swiger was born in the county of Harrison, on the 17th day of July, 1874. He received an education in the public schools of that county, and after completing a course at Salem College, a Seventh Day Baptist institution, he went to the West Virginia University at Morgantown, and after completing the law course there in 1889 began the practice of the law. He was admitted as a practitioner in the circuit court of Harrison county on the 13th day of September of that year, and died on the fourth anniversary of his admission.

He was a man of small stature and of delicate health, but had a wonderful tenacity of life. He had been a careful student, and was, for one so young, a safe adviser. He was an earnest advocate and a man of pure ideals of professional ethics. His aspirations and ambitions were noble, and he doubtless would have reached a high place among the profession in this state, had not dread consumption carried him to an early grave.

The bar at Clarksburg paid a high tribute to young Swiger in resolutions passed at a meeting held shortly after his demise, among them the following:

"Resolved, That in the death of Mr. Swiger the bar realizes that it has lost a member whose ability, ambition and persistent application to the law marked him as one of those chosen to rank high as a lawyer and advocate. As a counselor, he was careful and capable. As an advocate, he was energetic and painstaking in his preparation, and skilful and resourceful in the trial of a case. He was energetic and faithful in caring for the interest of his clients, and earnest in all questions and measures affecting the welfare of the county and community. He was a young man of the highest moral character and commanded the respect of the bar and of the community."

He has gone to the grave, but that grave
"Cannot wholly dim
The gracious genius Heaven gave."

The death of Wilson Shannon Wiley, on January 20th, 1903, cast a gloom over the community at New Martinsville, where he had lived for more than a third of a century. Mr. Wiley was about fifty years of age when he died. He was born in Belmont county, Ohio, and whilst a boy his parents removed to Monroe county, Ohio, where he grew to manhood.

After receiving a common school education he came to Marshall county, in this state, and taught school there before he removed to Wetzel county to carry on the mercantile business, at a place named after him, Wileyville.

When about the age of thirty he commenced the study of the law, and in 1876 was admitted to practice, and commenced his career as a lawyer at New Martinsville, and in that year was elected prosecuting attorney of Wetzel county, to which office he was twice re-elected.

Mr. Wiley was one of the founders of the "Wetzel Democrat," and for a long time was associated with the late Captain Robert McEldowney in the conduct of that newspaper. He became the proprietor of that journal and owned it at the time of his death.

Mr. Wiley was one of the promoters of the Wetzel County Bank, was one of the directors, and for eleven years the president of that institution.

As a lawyer he was recognized as painstaking and faithful to his clients, and achieved much success at the local bar. In his death the bank lost a valued and faithful officer; the bar a trusted and respected lawyer, and the community a useful and prominent citizen. Peace be to his memory.

"Within the narrow grave" is shut the mortal part of another member of the Clarksburg bar. On the closing night of the year 1902, Marcellus M. Thompson was suddenly called by the grim messenger.

Marcellus M. Thompson was born in the city of Clarksburg on the 10th day of March, 1859, the son of a local minister of the Methodist Episcopal

church, a shoe-maker by occupation, but a man of more than ordinary ability.

When a boy, Marcellus M. Thompson was under the tutelage at the public school of Clarksburg of that able lawyer, C. W. Lynch, whom you all know.

At school young Thompson exhibited a high degree of proficiency, especially in mathematics, in which he was eminently successful, and carried on a correspondence and did some mathematical work of high order for prominent publications engaged in the solution of difficult problems.

He afterwards taught school and took up the study of law about the year 1883. In the practice of his chosen profession, he was more than ordinarily successful and won for himself a good reputation as a safe counselor, faithful lawyer and efficient advocate, and soon became a very formidable opponent in the trial of cases in court.

He was the author of Magistrates Manual and Forms, which he twice revised, the last revision having been completed but a few months before his death.

For several years he was the recorder of the city of Clarksburg, and revised and codified the ordinances of that municipality.

In the year 1900 he was elected mayor of the city of Clarksburg and served his term.

He was also a master commissioner in both the United States circuit court and the circuit court of his county, and in that capacity he exhibited a high degree of professional knowledge, the reports being methodically arranged, and presented all legal questions in a clear and distinct manner.

Mr. Thompson was a man of social and genial nature, and he loved the society of the members of the bar. He was recognized as a young man of ability, and it has been said of him that if life had been spared he would have become eminently efficient and able in his profession.

At the meeting of the members of the bar at Clarksburg, after his death, Judge Edwin Maxwell, to whose memory a tribute has been submitted by this committee, presided, when a tribute prepared by the Hon. J. J. Davis to the memory of Mr. Thompson and spoken to by Judge Maxwell, was offered and unanimously adopted. It is an eloquent tribute and well does it bear testimony to the deceased in the following language:

Death has again invaded the ranks of the bar of Harrison county and called away from our midst our brother, Marcellus M. Thompson, whose untimely demise, following quickly upon the sudden and unexpected death of his wife, marks the event as one peculiarly sad and distressing. Members of the bar of Harrison county, assembled to pay a tribute of respect to the memory of our deceased brother, and to give expression of the loss sustained by them as well as by the community, adopt these resolutions:

Resolved, That we have heard with unfeigned regret of the sudden and melancholy death of Marcellus M. Thompson, a member of the Harrison county bar, which occurred on the night of December 31st, 1902.

Resolved, That in the death of Marcellus M. Thompson, the bar realizes that it has lost one of its brightest intellects, and a brother and practitioner who had risen to distinction in his chosen profession. As a lawyer, he was energetic, industrious and capable; as an advocate, he was eloquent and persuasive; as a citizen, he was upright, honest and progressive, commanding the respect of his clients and the public.

He has gone from us into the valley and shadow,
"Yet after night Day comes, and after turmoil, Peace."

Report of Committee on Amendment of Law Concerning Depositions.

To the West Virginia Bar Association:

At your last meeting I was constituted a special committee to take charge of a bill approved by the Association relative to the taking of depositions in short-hand, and herewith beg to submit my report:

On January 19th I introduced the bill in the Senate, and it was designated as Senate Bill No. 40, and referred to the Committee on Judiciary. See Senate Journal, page 113.

January 21st. The bill was reported back with recommendation that it do pass. Journal, page 130.

January 22nd. Bill read first time and ordered to its second reading. Journal, page 148.

January 23rd. Bill read a second time and ordered to its engrossment and third reading. Journal, page 181.

January 26th. The bill was passed with twenty-three votes for and none against. Journal, page 196.

January 27th. The bill was reported to the House. Journal, page 227.

February 9th. The bill was read the first time in the House. See House Journal, page 511.

February 10th. On motion of Mr. McGregory the bill was referred to the Committee on Judiciary. Journal, page 535.

February 16th. It was reported back with recommendation that it do pass. Journal, page 595.

This bill remained on the House calendar, and was on its second reading when the session adjourned. With more than two hundred bills on the House calendar, those acquainted with the workings of the legislature will readily see how difficult it was to advance the bill on the calendar. For this reason the session closed with a much needed law unenacted.

Respectfully submitted,

HARVEY W. HARMER.

Report of Committee on Uniformity of Legislation.

To the West Virginia Bar Association:

Your Committee on Uniformity of Legislation reports: That in accordance with the recommendation of the Association last year, there were submitted to the legislature two bills, as follows:

1st. "An Act to provide for the appointment of commissioners for the promotion of uniformity of legislation in the United States," in the form that was submitted to and approved by this Association.

This proposed Act has been before the legislature several times, has received fair consideration, and would have passed but for its position on the long calendars. The same bill was introduced in the last legislature and failed to pass for a like reason.

Thirty-five states have passed this Act, and commissioners have been appointed. It should be enacted in West Virginia.

2nd. The Negotiable Instruments Act is the law in seventeen states.

This Act was introduced in the last legislature assembled in this state, was favorably reported from the Judiciary Committee of the Senate, and ordered to a second reading; but the time did not admit of its passage before adjournment. Your committee has the assurance that this and the Commissioners Act will be introduced early in the next legislature, and efforts actively made to have both subjects become laws.

It is suggested that this Association continue its approval and cooperation in the attempt to reach uniformity of the law in West Virginia with that of other states, by again recommending the passage by the legislature of the two laws mentioned.

W. W. VAN WINKLE,
Committee.

Report of Delegates to American Bar Association.

To the West Virginia Bar Association:

The undersigned, a delegate to the American Bar Association, held in August last, respectfully reports as follows:

He attended the meeting which was held at Hot Springs, Virginia, on Wednesday, Thursday and Friday, August 26th, 27th and 28th.

The session began at 10:30 a. m. and 8 o'clock p. m. on Wednesday and Thursday, and at 10:30 a. m. on Friday.

The following was the program:

Wednesday morning, 10:30 o'clock:—
The President's address, by Francis Rawle, of Philadelphia, Pennsylvania.
Nomination and election of members.
Election of the General Council.
Report of the Secretary.
Report of the Treasurer.
Report of the Executive Committee.

Wednesday evening, 8 o'clock:—
A paper by Sir Frederick Pollock, of London, England.
Discussion upon the subject of the paper read.

Thursday morning, 10:30 o'clock:—
The Annual Address, by Hon. Le Baron B. Colt, of Rhode Island, United States Circuit Judge for the First Circuit.
Reports of Standing Committees:
- On Jurisprudence and Law Reform.
- On Judicial Administration and Remedial Procedure.
- On Legal Education and Admission to the Bar.
- On Commercial Law.
- On International Law.
- On Grievances.
- On Obituaries.
- On Law Reporting and Digesting.
- On Patent, Trade-mark and Copyright Law.

Thursday evening, 8 o'clock:—
A paper by William A. Glasgow, Jr., of Roanoke, Virginia.
Discussion upon the subject of the paper read.
Reports of Special Committees:
- On Classification of the Law.
- On Indian Legislation.
- On Uniform State Laws.
- On Penal Laws and Prison Discipline.
- On Federal Courts.
- On Federal Code of Criminal Procedure.
- On Industrial Property and International Negotiation.
- On Title to Real Estate.
- On Louisiana Purchase Exposition.
- On Comparative Study of World Legislation.

Friday morning, 10:30 o'clock:—
Nomination of Officers.
Unfinished business.
Election of Officers.

The annual dinner was given by the Association to its members and delegates at Homestead Hotel, commencing at 8 o'clock on Friday evening and ending much later, or rather in the early hours of the next morning.

The remarks of Mr. Braxton, who had been selected by the Virginia Bar Association to welcome the members and delegates to the American Bar Association, was a most fitting and choice production, and was a gem of oratory and eloquence.

The address of the President, Hon. Francis Rawle, of Philadelphia, was indeed most excellent and instructive. It contained a short but very satisfactory history of the American Bar Association from its formation in August, 1878, at Saratoga Springs. His rehearsal of the good that has been accomplished by the Association in the way of securing uniform laws on subjects so related as to require uniformity, and in other important respects, was calculated to arouse the pride of any lawyer in the noble and honorable profession to which he belongs.

The paper read by that distinguished lawyer, scholar and author, Sir Frederick Pollock, of England, on "English Law Reporting," should be read to be appreciated. It is published in the American Law Review for September-October, 1903.

The annual address was delivered by Hon. Le Baron B. Colt, of Providence, R. I., United States Circuit Judge for the First Circuit. The subject was: "Law and Its Reasonableness." It is highly interesting and instructive.

The only other address before the Association was that of Mr. William A. Glasgow, Jr., of Roanoke, Virginia. His subject was: "A Dangerous Tendency of Legislation."

Like the other papers and speeches read and delivered before that august and honorable body, due appreciation could only result from reading or hearing them.

It would require more time to make a detailed statement of the reports of the various committees, which have been named, than we would consider at our command.

We must, however, briefly notice the report of the Committee on Commercial Law." It was regarded by some members of the Association as a most remarkable document, in so far as it was devoted to "Commercial Law and Modern Commercial Combinations."

That part of the report relating to bankruptcy legislation was promptly received and approved, but the elaborate discussion of the subject of trusts provoked considerable debate, and indeed some apparent bitterness. General Manderson, of Nebraska, a former President of the Association, said he had read the report with surprise, disgust and indignation. Mr. Seymour D. Thompson, of New York, moved to recommit the report with instructions to the committee to study the subject further. There were objections to this motion, chiefly on the ground that the motion was regarded as implying that the committee had not properly studied the subject. Mr. Thompson's chief objection to the report was that it was silent on the subject of labor monopolies and labor trusts, as he expressed it, and that it denounced capitalistic combinations only. Finally, on motion of Mr. Judson, of St. Louis, the following resolution was adopted:

Resolved, That the part of the report of the Committee on Commercial Law relating to modern commercial combinations be re-committed to the committee for the ensuing year, and that said committee be instructed to report specific remedies in legislative form for any unlawful combination which may threaten commercial intercourse.

The report is signed by Walter S. Logan, of New York, chairman;

Henry Budd, of Philadelphia, Pennsylvania; Gardner Lathrop, of Missouri; George Whitlock, of Maryland; and John Morris, of Indiana, being all the members of the committee.

It is undoubtedly a strong presentation of the questions discussed, and without committing ourselves to some of the remedies proposed, it must be conceded that it is a strong paper and contains much truth. The report is submitted herewith.

The Committee on Patent, Trade-mark and Copyright made a report containing the draft of a bill on the subject.

The same committee made a report containing the draft of a bill to establish a United States court of patent appeals, and to define and regulate in certain cases the jurisdiction of other courts of the United States. After an amendment, touching the name of the court, the report was accepted.

The report of the Committee on Law Reporting and Digesting showed that two of the members thought it possible to curb or restrict publications of judicial decisions, while one member took a different view. The Association adopted the minority view.

The banquet was held in the great dining room of the Homestead Hotel, which was filled to repletion. The toastmaster was Mr. Henry D. Estabrook, of New York. The notable speeches at the banquet were made by Governor Montague, of Virginia; Sir Frederick Pollock, of England; Fred W. Lehmann, of St. Louis; Thomas J. Kernan, of Louisiana.

It is needless to say that the American Bar Association was royally received and heartily welcomed by Virginians, and that the hospitality of our fraternal friends and others in the old Dominion, was cordial and unbounded.

In the language of Mr. Thompson: "Dinners, drives, parties, everything that a generous hospitality could suggest, were showered with lavish hand upon the members and their families and guests; and when they undertook to compliment the Virginians for so doing, they were met with something of surprise, and with a statement, 'Why, this is merely our habit, it is the way in which we treat each other.'"

The American Bar Association concluded its session by selecting St. Louis as the place for holding its twenty-sixth annual meeting, and appointed September 26th, 27th and 28th as the time for holding the same. This will be immediately before the convention of the World's Congress of Lawyers.

Mr. James Hagerman, of St. Louis, was elected President of the Association.

In conclusion, we desire to say that Mr. R. R. McMahon, of Harper's Ferry, the other delegate to the Association, did not attend, on account of sickness.

It may be well to remind this Association that under Article IV. of the by-laws of the American Bar Association, each State Bar Association may annually appoint delegates, not exceeding three in number, to the American Bar Association.

Messrs. B. M. Ambler, George E. Price and Harvey F. Smith, members of the American Bar Association, and Messrs. W. N. Miller and W. A. Bratton, who became members, and Prof. W. P. Willey were in attendance, and always cheerful and ready to help, by way of counsel, the delegate who attended.

Respectfully submitted,

W. W. BRANNON.

A Method of Selecting Judges.

Clyde Johnson, of the St. Marys Bar.

A little while ago, in thinking over its achievements, it came to me with great force that this Association, during its twenty years of life, has accomplished every great reform it has undertaken. In obedience to the "first law of nature" it advocated a change in the method of admissions to the bar, and an act prepared by a committee of its members is now upon our statute books, the effect of which has undeniably been to elevate the standard of the profession in our state. It championed the cause of more liberal salaries for the judiciary, and now, after years of battle against the two great forces of popular prejudice and political expediency, our judges are receiving almost double the salaries paid when this Association first volunteered to prosecute their case. We urged the necessity for an additional judge of the court of appeals, and he now sits upon the bench. This Bar Association has many other reforms to its credit, but these I have mentioned are the great victories that have been written into its history. It may safely be said that the failure to bring about a change in our system of land titles is due to the fact that the members of the Association are not a unit upon the expediency of any proposed measure looking to that end.

This bit of history brings the conviction that this Association is a great force in West Virginia, and can accomplish any reform in support of which it presents a united front. Any measure, then, upon which we all agree at once becomes a pressing importance in details and manner of execution, for its accomplishment is near at hand.

I believe that if there is one question upon which, above all others, the members of the West Virginia Bar Association agree, it is the necessity for a change in the manner of the nomination and election of judges. Upon the general proposition that the selection of judges should be divorced absolutely from partisan politics there will be no discussion here, but when we turn to a practical method of bringing about this "consummation so devoutly to be wished" we encounter difficulty. It is to suggest the outlines of what I believe to be a feasible solution of this difficulty that this paper is submitted.

At the next November election circuit and criminal judges throughout the state and two judges of the appellate court are to be elected, and this offers a rare opportunity to introduce and test the working of a new mode of selection.

It goes without saying that any plan to be effective at the coming election must be one that does not involve any new legislation. The next legislature will not convene until January, 1905, and legislative action is a rare plant, often noxious, always dangerous and of slow growth.

Briefly stated in its outlines as applied to the election of circuit judges the plan I offer is this:

(1) Let the executive committees of the two leading political parties in each judicial circuit meet and agree to this plan of selecting one judicial candidate for both parties, and to certify his name to be placed upon both or all tickets.

(2) Select in each county of the circuit nine men, three lawyers, three merchants and three farmers, who shall be chosen regardless of political affiliation, and from the best and most conservative men in each occupation.

(3) Let these nine conferees meet with a like number selected by each of the other counties in the circuit, at a time and place to be fixed by them, and select from among the lawyers of the circuit a suitable candidate for judge, regardless of political affiliation, and certify their selection to the judicial committees of the two political parties.

(4) Let each executive committee certify to the proper authority the name of the candidate so chosen, and the ballot commissioners place his name upon the ballot on both tickets, thereby insuring his election without dragging him into the mire of a political campaign, in a canvass for votes from which it is impossible that he could emerge with the spotless robes that should adorn the bench.

The greatest difficulty that this plan presents is, how to select the nine conferees in each county. This is a feature that has given me much trouble, and I am not entirely satisfied with what I am about to offer, but the following has suggested itself to my mind: Have the Farmers' Institute in each county select the three farmer members, the local County Bar Association the three lawyers, and the six so chosen select the three merchants.

I submit that this plan, with its details elaborated, is a practical one and will accomplish the desired result. It does not involve any change in either our state constitution or existing statutes, and with very little modification can be applied to the selection of appellate as well as circuit judges. It has the merit of simplicity and with a little well directed explanation would commend itself to the people at large, who are already clamoring for the same reform we are advocating.

This plan would put the selection of the judicial candidate in the hands of the three greatest interests of the community that are most vitally concerned in having a pure and capable man on the bench, and who care the least to what political party he belongs. They would, I think, be less likely to be influenced by partisan or other improper motives, and would come more nearly taking the judicial question entirely out of politics than any other body of men to whom this duty could be entrusted.

Under our present method of selecting judges the candidate both for nomination and election is compelled to grovel in the dust of self-abasement or face certain defeat. After he is elected it exposes him not only to the charge that he pays his political supporters in judicial favors, but to the temptation to actually do so. He knows there is another election at the end of his term.

No man with the pure mind and high ideals that a judge should take with him to the bench can bring them through the slime of modern politics untarnished.

I have always felt a lively interest in this question, and in response to Brother Ambler's invitation in this month's "Bar" I offer the plan I have thus outlined as a suggestion. If some of you can bring forward a better, I am with you. In whatever the Association at this meeting decides to do, I am with you. But I think it is very important that some definite plan be approved by the Association now, and some active measures be taken to make that plan effective in the coming judicial elections.

The Time Sentence and The Reformatory System.

Frank W. Nesbitt, of the Wheeling Bar.

Present methods have not solved the problem of dealing with the criminal class. Disorder appears to be on the increase, our jails and penitentiaries are overtaxed, the administration of criminal justice is a subject of almost universal criticism, even of contempt and ridicule, and the court of Judge Lynch sits almost every day in the year.

Where lies the fault? What is the remedy? This problem is purely economical and educational, and must be approached and studied, not in a spirit of passion, or of resentment toward those accused of violating our laws,—for we must never lose sight of the fact that the very life of all popular government depends upon at least an honest effort to do justice between man and man,—nor yet with that mawkish sentimentality which in its philanthropic zeal would rob crime of the terrors, and turn the criminal loose to seek new laurels in his trade, but calmly, dispassionately, scientifically, having always in view the sole justification for criminal punishment,—protection to the public.

It has come to be fashionable to charge all the ills that the body politic is heir to to the law's delays and technicalities. Complaint is common that this defendant has been dealt with too severely, or that that one has not gotten his just dues. Individual cases are balanced one against the other, and the conclusion is reached that courts are but dice boxes after all. Popular clamor demands the annulment of those technical rules which are taken advantage of by the guilty to postpone the day of execution. It is even proposed to take away the right of appeal in all criminal cases. Here is what Associate Justice Brewer, of the Supreme Court of the United States, has to say: "What can be done to stay this epidemic of lynching? One thing is the establishment of a greater confidence in the summary and certain (remember, summary, as well as certain) punishment of the criminal. Men are afraid of the law's delays and the uncertainty of its results—they know that the law abounds with technical rules, and that appellate courts will often reverse a judgment of conviction for a disregard of such rules, notwithstanding a full belief in the guilt of the accused. If all were certain that the guilty ones would be promptly tried and punished, the incitement to lynching would be largely taken away. In an address which I delivered before the American Bar Association at Detroit some years since, I advocated doing away with appeals in criminal cases. It did not meet the favor of the Association, but I still believe in its wisdom."

In other words, Judge Brewer and his school would have us emulate the example of the enlightened Hindoo woman and appease the public passion by human sacrifice,—try every man accused of crime by hue and cry. Thank God, it did not meet the favor of the American Bar Association.

Is there not more wisdom, sobriety and bravery in these words of Justice Woodward, spoken last summer at Lake Chautauqua? I quote at length:

"The technical rules which are made use of by the guilty to delay the day of execution are the rules which guarantee to the innocent the reserva-

tion of their rights, even in face of public clamor,—if speed is in fact a desirable end to be accomplished in dealing with crime; if it is necessary as a concession to the spirit of savagery which survives beneath the veneer of civilized life, it is within the power of the men who make up and support, negatively or positively, the mobs which have terrorized and disgraced large areas of our country, to provide the machinery by which men charged with crime may be railroaded to their doom. They may, if they choose, so change the rules of evidence and the methods of procedure that every malefactor may be accused, tried, convicted and punished with neatness and despatch, amid the plaudits of a community which stands ready to accept almost anything so long as it is rapid, but it may be doubted if the expedient would serve to lessen the number of crimes or their atrociousness."

It certainly cannot be doubted that experience has proven, at least prima facie, that fear of swift, certain and terrible vengeance has not as yet had the effect of bringing about that peace and security from murder and rapine which is so confidently promised by the advocates of summary justice. And yet summary justice has had and is having her day in court, not in a legally constituted tribunal, it is true, but nevertheless her decrees are being duly executed, as Judge Woodward says, "with neatness and despatch."

During the past few years, if we are to believe statisticians, there have been more lynchings than legal executions in this country. The rapist is almost certain of death in its most horrible form,—he knows it before he commits his crime, and yet his crime is committed. Lynching for murder has not reduced the crop of murderers. According to the chief justice of North Carolina, more men have been executed by lynching in that state in the last fourteen years than by legal process, and some years twice as many; while during the same period the number of murders has increased two-fold, manslaughter four-fold, and other crimes about seventy per cent. State vs. Cole, 44 S. E., at page 396. Does this not indicate that the true purpose of punishment,—the safety and welfare of society—is not promoted by summary justice?

I can see no harm in a reasonable and conservative amendment of our rules of practice and of our statutes fixing the terms of courts, nor can I see that injury would result from the passage of new laws which will expedite the maturing, hearing, consideration and decision of criminal cases on appeal; but I am firmly convinced that should the day ever come when the state, in whose parental arms the citizen lays his life and liberty, shall yield to the popular clamor for the destruction of our bulwarks of liberty, merely to appease a lawless and savage thirst for blood, the outcome cannot be other than disastrous. Crime can never be reduced by compromise with crime.

Let us look deeper for the solution of our problem. Is it not possible that while we are looking for motes in the eyes of justice we may be overlooking beams both in her eyes and in our own?

Our ancestors, in their crude and sanguinary penal codes, prescribed death as the proper punishment for every felonious act. Blackstone tells us that even in his day it was a melancholy truth that among the variety of actions which men are daily liable to commit, no less than one hundred and sixty were declared by Act of Parliament to be felonious without benefit of clergy; or in other words, to be worthy of instant death. Of minor offenders, some suffered forfeiture of their lands or goods, others were banished or subjected to some bodily mutilation, or were sent to the

pillory or the whipping post. In the early days prisons were regarded, not as instruments for the punishment of those found guilty of crime, but rather as places for securely detaining those accused until trial, and those convicted until punishment. As civilization advanced and men grew more humane, the infliction of the death penalty and of all forms of torture became distasteful and rare, and imprisonment for specified terms as a means of punishment was gradually substituted. To-day our penal codes assign imprisonment as a penalty for nearly every act they forbid, both felony and misdemeanor, but by specifying a maximum and a minimum term leave it to the trial judge to fix the duration of imprisonment within these limits, according to his view of the criminal's deserts. This change,—the offspring of sentiment alone and not the resultof any reasoned conviction that confinement serves a better purpose,—is now almost complete and universal.

While the time sentence was established to supercede the cruder and more shocking penalties of earlier times, and is itself a protest against them, yet "it is based upon the same principle of punishment and is inspired by the same sentiment of retribution for wrong that characterized the methods of punishment that preceded it." While its defenders claim for it the incidental virtues of preventing further offences by the offender, of repressing the criminal tendencies of others, and, in some instances, of reforming the prisoner, the root of the whole doctrine upon which the system of the time sentence is based is the expiation of the crime and not the expurgation of the criminal. It is retributive justice veneered to please the fastidious taste of a tender-hearted sentimentality. Its motto is "Punishment the principle, prevention the incident."

I submit that this system is wrong in principle, and unjust and injurious in practice. It had its origin in the false notion that the state can and ought to apportion retribution for offences. It is but a manifestation of the native impulse to return evil for evil. "Every brute and every man whose hand is brutal, seeks instinctively to hurt those who hurt him, and the notion of retributive justice in all its forms is but the development of this crude instinct." It is the assertion of a right by the state which the state can never possess, for the state has no rights but those surrendered to it by its citizens, and no citizen, no human being, ever could surrender the right to vengeance, for it never was his to give. "Vengeance is mine," saith the Lord, and for any individual or group of individuals to assume to measure punishment in retribution for crime is to usurp the prerogative of Divinity.

The system of the time sentence requires of every criminal judge an utter impossibility. If he would do exact justice he must mete out to each offender a precise equivalent in pain for the injury inflicted by him upon the state, and add to this sufficient to satisfy for atonement the outraged Divinity. He must exact the pound of flesh, no more, no less. If more be taken, an individual's rights have been infringed, and if less be required, the peace and dignity of the state have failed of vindication. He must foreknow and accurately predetermine what amount of suffering each individual prisoner will experience by a single day's imprisonment, and multiply that amount of pain by the law's estimate of the enormity of the crime committed.

The effect of retributive justice upon those brought under its lash is uniformly disastrous. Let me quote from an authority on this subject. Mr. Z. R. Brockway, superintendent of the New York Reformatory at Elmira, says:

"It cannot be expected that much reformation through punishment by the shock and pain of it can be wrought by penitentiary imprisonment. Such is the gradual approach of prisoners to the final committal to prison, —so preceded is it by vicious habits and associations, then by arrest with temporary detention in station house and jail,—that there is no sudden transition from innocence and liberty to guilt and confinement, by which the effective shock would be produced. And strong is the tendency of human nature to be contented with the situation that is for the time inevitable,—to find some comfort in the worst of experiences; so rapidly do the tastes and habits become adjusted to environment, and so meliorated is the condition of prisoners in modern penitentiaries, that no effective reformative influence is likely to be derived from associations in the prisoner's mind of the pain of imprisonment with the act and conduct for which he is imprisoned. Moreover, if by any means imprisonment is made so impressive that the prisoner remembers it afterwards as a punishment for crime, he must estimate the punishment as either inadequate, and exult at the good fortune or smartness of his evasion of the intended purpose; or else, estimating his punishment excessive and unjust, he will remain embittered and revengeful; or again, if he estimates his punishment as equal to the offence, he will justify himself as one who has paid for his crime and who is now at quits with society and with moral obligation. Each and all of these moods are inconsistent with or unfavorable to his moral reformation and subsequent good behavior."

Vindictive punishment as exemplified by the time sentence is but a synonym for compulsory education in crime. Most of our professional criminals have been restrained from youth up through successive detentions in lockups, city prisons, jails and penitentiaries on time sentences under influences which tend to educate them as criminals and confirm them in a vicious life. Under this system, "if a man once violates the law and is caught, he is put into a machine from which it is difficult for him to escape without further deterioration." It is not simply that the state puts a brand on him in the eyes of the community, but it takes away his self-respect without giving him an opportunity to recover it; it turns him loose at the end of his term of imprisonment with his certificate of criminality emblazoned on his brow. "Once recognized as in the criminal class, he has no further concern about the state than that of evading its penalties so far as is consistent with pursuing his occupation of crime."

And what do we gain by our present method? Is the protection of society effectively secured? To answer in the affirmative would be a palpable misstatement of the fact. The protection of the community against its enemy, the criminal, can be effected in but two conceivable ways,—his social regeneration or his social extermination. "We must reconcile the criminal, or we must disarm him." The time sentence does neither. In punishment for what he has done in the past it holds him in restraint until his term ends; and then, without regard for what he may, and probably will, do in the future it lets him go. Notwithstanding the fact that he may have demonstrated beyond the peradventure of a doubt that he is unfit to be free; notwithstanding that he may have even boasted of his intention to become a prey upon society immediately upon his release, the prison authorities are powerless in the premises and by force of law must set him free. I find no better parallel than that of one who would cage a man-eating tiger for a month or a year and then turn him loose. "Even those who cling to the notion that the business of society is to punish the offender must confess that in this game society is getting the worst of it.

Society suffers all the time, while the professional criminal goes on with his occupation, interrupted only by periods of seclusion, during which he is comfortably housed and fed.'

But this is not the worst of it. This system has sunk its fangs into the breast that nourished it. Through our laws it tells us that vengeance is a human function. It has misled the public mind into the notion that the state is a vicarious avenger of wrongs, rather than a protector of rights. Under its teaching we have learned to feel that we have a right to look to our courts to mete out to the offender blow for blow and pain for pain. The impossibility of its requirements and the consequent failure in its administration have induced a restlessness and discontent in the public mind. The state says to the people: "We will give you blood for blood; you can trust us to do justice for you." And then the state, from the very nature of things, finds it impossible to keep its bargain to the satisfaction of the public mind. The populace, particularly the ignorant and disorderly elements, trained as they are into the habit of assuming that the Mosaic doctrine of "an eye for an eye and a tooth for a tooth" still lives in this day and generation; beholding what appears to be a violation of trust on the part of the state; denied by the courts that which the spirit of the very laws administered by those same courts has induced them to expect; held in leash on the still hot trail while the quarry escapes,—break loose from the bonds of social order and seek with rope and torch to do that which our system of criminal laws has taught them to call "justice." Lynch law is anarchy, says President Roosevelt, and anarchy is the herald of tyranny.

Such is retributive justice practically applied in the penitentiary time sentence. It is immoral in principle, and unjust and unscientific in application. It fails to reform the prisoner and it fails to protect society. Its lockups are kindergartens, its jails are academies, and its penitentiaries are universities of crime. Its origin was brutal and it teaches a brutal doctrine, misleading and pernicious in its influence on the public mind, while its glaring inequalities, its tangled absurdities and its manifest failures when put to the test of practical demonstration are the scourges that lash into fury the savage passion of the mob. Here, then, lies the root of the evil, and it is embedded deep in our criminal jurisprudence.

The increase of crime, the crowding of our penitentiaries, the contempt of our criminal courts and the evils of mob violence will never be to any degree checked until we have torn from its lodgement in our laws and our policy the entire system of vindictive punishment for crime. The entire abandonment of retribution as a motive is the first condition of a rational criminal jurisprudence. This abandonment of all thought of retribution in dealing with offenders will of necessity carry with it the entire system of the time sentence, and necessitate the substitution of a system based upon the only justification for any criminal punishment whatsoever,—protection to the public. Such a system, I believe, is the indeterminate reformatory sentence.

"Prisons are necessary only to protect society; that is, either to disarm its enemy, the criminal; or to reconcile him. If the criminal cannot with safety to others enjoy his freedom, he should be confined and prevented from practicing crime. There is no other justification for confining him. This principle should determine at once the nature and duration of the confinement. The restraint should be just what is necessary to control him; every feature of it should be directed so as to prepare him, if possible, for freedom; and it must last just as long as he is unfit to be free." Let

society hold its enemy in restraint until he ceases to be its enemy, then let him go. This is the spirit of the indeterminate sentence.

There is an impression, accepted by a considerable portion of the public, that an experiment in the administration of the indeterminate sentence is actually being made. This is erroneous. The real indeterminate sentence is a measure as yet untried. It is still a theory, accepted and advocated, it is true, by many penologists both in Europe and in America, but not as yet adopted in legislation or in practice anywhere in the world. The misconception in this regard has arisen from the fact that in a number of jurisdictions parole and release laws are in force, providing that, upon certain conditions and under certain circumstances, prisoners who have shown themselves worthy may be given their liberty, either conditionally or unconditionally, before the expiration of the statutory sentence. A parole and release statute was passed at the last session of the legislature of West Virginia, (Acts 1903, ch. 45) providing as follows:

"Sec. 45. The governor shall have authority, under such rules and regulations as he may prescribe, to issue a parole or permit to go at large, to any convict who now is, or hereafter may be, imprisoned in the penitentiary of this state, under sentence other than a life sentence, who may have served the minimum term provided by law for the crime for which he was convicted, and who has not previously served two terms of imprisonment in any penal institution for felony. Every such convict, while on parole, shall remain in the legal custody and under the control of the governor, and shall be subject at any time to be taken back within the inclosure of the penitentiary for any reason that shall be satisfactory to the governor, and at his sole discretion; and full power to retake and return any such paroled convict to the penitentiary is hereby expressly conferred upon the governor, whose written order, when attested by the secretary of state, shall be sufficient warrant, authorizing all officers named therein to return to actual custody in the penitentiary any such paroled convict; and it is hereby made the duty of all officers to execute said order the same as an ordinary criminal process. This Act shall not be construed to operate in any sense as a release of any convict paroled under its provision, but simply as a permit granted to such convict to go without the inclosure of the penitentiary, and while so at large he shall be deemed to be serving out the sentence imposed upon him by the court, and shall be entitled to good time the same as if he were confined in the penitentiary.

"Sec. 46. Every sentence to the penitentiary of a person hereafter convicted of a felony, except for murder in the first degree, who has not previously been convicted of a felony and served a term in a penal institution, may be, if the court having said case thinks it right and proper, a general sentence of imprisonment in the penitentiary. The term of such imprisonment of any person so convicted and sentenced may be terminated by the governor as in the case of paroled prisoners; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced; and no such prisoner shall be released until after he shall have served at least the minimum term provided by law for the crime of which he was convicted." * * *

But this is not the indeterminate sentence; it is, in fact, determinate, because the statute prescribes its limit. However that may be, it is a practical victory for the principle and a concession to the theory of the indeterminate sentence. An indeterminate sentence is a committal to prison without any limit. "It is exactly such a commitment as the court makes to an asylum of a man who is proved to be insane; and it is par-

alleled by the practice of sending a sick man to the hospital until he is cured." It regards crime as a pathological condition in society, and courts and prisons as instruments of cure.

This being the viewpoint from which the advocates of this system regard crimes and criminals, the question arises: What are we to do with our malefactors after we have locked them up? Shall we hold them in confinement under a sentence whose termination depends upon the success of their own efforts toward reformation, and which in the absence of that success will become a life sentence, and at the same time afford them no better opportunities for self-improvement than are offered in our penitentiaries of to-day? Emphatically no.

The successful operation of this system requires as a necessary accompaniment, as a corollary, that every state prison and penitentiary must be a reformatory in the broadest and most modern meaning of that term. "It would be against the interest of society, in violation of all its instincts of justice, and the height of cruelty to an individual criminal to put him in prison without limit, unless all the opportunities were afforded for changing his habits radically."

"Every reformatory should study the physical, intellectual and moral defects which mark its inmates and which have brought them there. It should seek to remove these by enforcing cleanliness, education, and habits of truth, self-control and industry. It should teach useful occupations, suggest motives to exertion, seek to awaken the mind to a sense of social relations and duties, and hold ever before the prisoner the sweet prospect of self-earned freedom and self-asserted manhood."

Under the working of this system the prisoner would become the arbiter of his own fate. He would carry the key of his prison in his own pocket. He would have ever before him the definite alternative to frame his life and character according to law and duty, and go forth a free man among his fellows, or to cherish his rebellious temper and vile instincts and remain in durance, if need be, until he is released by the hand of death.

Objection may be made that the indeterminate sentence can never be equitably administered; that no man or set of men can be trusted with the awful responsibility of deciding upon their own judgment just when confinement in each individual case should cease. It must be admitted that this decision cannot be unerringly made in all cases. The work of the finite intellect can never be brought to the perfection of the infinite. The reformatory method with criminals can never be administered without error, and such errors must work hardships. The sly deceptive rogue may deceive his keepers and obtain an early release, while the truly worthy still remains confined. This cannot be denied. It is a fearful necessity that is thrown upon the state to exercise such a prerogative through fallible agents. I leave it to abler hands to answer this objection.

Charltan T. Lewis, in his great essay on the reformatory system in America, read before the International Prison Commission at its congress in the year 1900, says:

"If imprisonment must be practiced, somebody must be vested with the power to decide who shall be imprisoned and how long. Assuming the necessity of restraint, human minds, capable of error, must assign and administer it. Observe, then, that the objection in question applies with a thousand-fold more force to the traditional system of retribution than to the scientific system of reformation. If students of humanity, trained in the work of searching the character, stimulating the better motives and watching for the growth of responsibility and conscience, who are in daily

and hourly intercourse with their wards for the sole purpose of preparing them to be free, may still be deceived in them, what shall we say of the judge who sees the prisoner for an hour or a day at his bar, and whose knowledge of him is carefully limited to the single act of which he is accused? While the difficulty of fair and effective administration will always be felt under any system of law, that difficulty amounts to utter impossibility under the current system of retribution, and would be indefinitely diminished under the reformatory plan. Thus the objection urged against the indeterminate sentence and its corollaries becomes, when candidly examined, an unanswerable plea for its adoption."

But, it may be said, the system you advocate would deny the right of the legislature to enforce its own laws by the death of the transgressor. Not so. The foundation principle of the indeterminate sentence is the only justification under the sun for the infliction of the death penalty. Judicial execution for revenge is but legalized lynching; judicial execution for the protection of the public is the social exercise of the first law of nature—self-defense. The method of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means either to exceed it or to fall short of it. Under the present system of justice by vindication, the life of the vilest wretch is declared to be a just forfeit in exchange for the life he has taken away, or for the more than life of which he has deprived the fair victim of his lust. This is absurd. Death is not always an equivalent for death. The execution of a human brute is in any case but poor satisfaction indeed for the outraged sanctity of American womanhood. The system of the indeterminate sentence would inquire concerning the convicted felon, not, What can we do to him? but, What should we do with him? Not, What does he deserve? but, What under the circumstances do the peace and dignity of the state, the welfare of its citizenship and the sacred security of its womanhood demand?

Sir Matthew Hale says: "When offences grow enormous, frequent and dangerous to a kingdom or a state, destructive or highly pernicious to civil societies and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of law-givers." This is the spirit of the protective system of criminal jurisprudence, as exemplified by the indeterminate sentence, and as applied to the infliction of the death penalty. It regards the protection of society, and that alone. While it knows no vengeance, and seeks to attain, if possible, the regeneration of its offenders, it recognizes the fact that there are some crimes so enormous, so frequent and so dangerous to the very life of society itself,—crimes which of themselves demonstrate in their perpetrators a disposition so far beyond hope or probability of reform, and which are of such frightful menace to the human race, that in sheer self-defense society is driven to the necessity of inflicting the highest penalty that man can inflict, and of removing from the earth those who commit them.

It has not been my purpose in this brief outline of a great social truth to enter upon a technical defense of the system of the indeterminate sentence in all its intricacy of detail and wealth of possibilities; but rather to submit my view of an evil, or rather a set of evils, from which society is suffering and to suggest what appears to me to be a necessary reform before these evils can be effectively, or even appreciably, eradicated.

Why should we tolerate any longer a professional criminal class? Mr. Brockway says that eighty per cent. of all criminals discharged from pun-

ishment prisons return to crime. These repeaters are responsible for a very large share of our burden of taxation. To watch them while they are at large and preying upon society we require far more police than would otherwise be necessary; while at the same time we expend more and more money each year for apprehending and trying them, for machinery of criminal justice, and for the interminable recurring farce of imprisoning them on short sentences and discharging them to go on with their trade of crime. On account of them we live behind bolts and bars, and we are in hourly peril of life and property in our homes and on the highways. Why not adopt the indeterminate sentence, and notify these pests of society that in the highway of professional crime there is no thoroughfare? Why not lock them up under a sentence that to them and those of their class will become interminable?

Why should we continue our system of compulsory education in crime? Why should we maintain at the public expense recruiting stations to the ranks of professional criminality? In the penitentiary at Moundsville 54 6-10 per cent. of the prisoners are under the age of twenty-six years. There are in that institution 185 boys not old enough to vote. Our system of retributive justice has stamped these lads as criminals. It has no interest in their welfare, it has no care for their future. It pronounces them "hardened in crime, unresponsive to good influences, unsusceptible, ungrateful, unreliable, treacherous, cruel." It has caged them in the same cage, placed them at the same bench, seated them at the same table, locked them in the same cell, and classed them in the same class with the wretch confirmed in crime. When the term of sentence of these youthful prisoners has expired, it will cast them forth worse than when they came, and wash its hands of all responsibility for their future.

Why not adopt the indeterminate sentence and its corollary, the reformatory system, and take such boys in hand, not for punishment, but for reformation? Why not educate them, not for criminals, but for peaceable, law-abiding citizenship? Detain them just so long as they continue to be dominated by those instincts, habits and impulses which brought them into confinement; just so long as they are unfit for social duties and responsibilities. Impress them with the fact that their discharge depends upon the success of their own efforts to reform, and then the moment that success in those efforts is achieved, give them their liberty. Let them go forth among their fellowmen new armed for life's struggle.

"What an inspiring sight to every lover of mankind would be a band of prisoned convicts whose hearts and lives have once been wasted, and trodden by evil passions and brutal impulses, now struggling under the tutelage of the state to put down these tyrants and win back for themselves the free light and air of manhood and of heaven! When liberty is thus achieved, it will be valued indeed, and will not lightly be lost again."

Why should we maintain and perpetuate a system of criminal jurisprudence whose foundation principle is the crude and savage instinct for revenge,—a system whose brutal doctrine adds heat, while its many manifest failures add fuel to the flames of public passion and disorder? Why not adopt the indeterminate sentence? Its motto is, "Prevention the principle, punishment the incident." Its cornerstone is, "Protection to the public." It is the only system that promises to relieve society of the insolent domination and terrorism of the professional criminal class. It is the only one that can deter men from making a career of crime. It is the only system which will persistently and consistently refuse its sanction to the spirit which dominates the mob. Such a system would revolu-

tionize the relations of the prisoner to all the agents of society who deal with him, and to society itself.

"The prison of to-day faces the past, and forever looks backward to the crimes committed, of which the sentences awarded are a perpetual reminder. The reformatory of the indeterminate system will turn to the future, 'A trumpet in the distance pealing news of better days.'"

Why not try the indeterminate sentence? Why not put the whole system of criminal jurisprudence and procedure for the suppression of crime upon a rational and scientific basis?

Land Transfers, Ancient and Modern.

Annual Address by Eugene C. Massie, of the Richmond, Virginia, Bar.

The history of the world revolves around the acquisition of title to lands. The rise and fall of empires and the destiny of the human race have been governed by the passion or necessity for territorial aggrandizement. The hopes and aims of individuals, as well as those of nations, have been rooted to the soil, and the story of the long and bitter struggle for personal liberty is intimately blended with that concerning the tenure of lands. Men have willingly undergone the severest privations and even poured out their life-blood to win or retain possession of coveted domains, whether great or small. And as we look upon the treasured mountains and rich valleys of this great state, we cannot forget the trials and battles of those heroes who conquered and subdued it, for posterity even more than for themselves. The county of Augusta in the Old Dominion once stretched from the feet of the beautiful Blue Ridge to the turbid waters of the mighty Mississippi, and something of its history may be gathered from a saying that became a tradition among the aborigines, that "all the clover was white until John Lewis came and stained it red with the blood of the Indians"—a tradition founded upon the fact that he not only slew many of their braves but also was the first to introduce the red English clover. Nor was all the blood spilled on one side, for his veins as well as those of his noble wife, Margaret Lynn, ran red in the fierce warfare; and the victory of Point Pleasant which assured the conquest of this magnificent region was sealed by the death of his intrepid son, Col. Charles Lewis, one of the first to fall in that memorable battle in which the Indians were led by their great warrior Cornstalk, sachem of the Shawnees and king of the northern confederacy.

The original transfer of title, beyond which no records can go, is described in the beginning of the Book—that peerless Volume of the ages—from which we learn that dominion over all the earth was given to man by his Creator;* and then we are more particularly told that our first parents were put into possession of a certain well-known garden, or messuage, denominated Eden, "to dress it and to keep it."† Thus was an estate of inheritance, by livery of seisin and actual entry, vested in Adam—a conditional fee—which, however, was afterwards forfeited by a breach of condition subsequent on the part of the donee, as some of you may remember.

When Abraham acquired the field of Ephron which was in Machpelah, from the children of Heth, some forty centuries ago, he was not content to take it as a gift nor to hold it by mere license; but he required Ephron to put a price upon it, and weighed out the necessary shekels in the audience of the people of the land. He was then formally put in possession and his rights were made sure in the presence of all the children of Heth. Thus was passed a title to "the field and the cave which was

* (Gen. 1, 26.) † (Gen. 2, 15.)

therein, and all the trees that were in the field, that were in all the borders round about"—a title of inheritance which remained sure and inviolate in Abraham and the generations that succeeded him.*

Among the Hebrews, the government being theocratic, tenures were solemnly declared to be of God Himself; for, says the inspired text, "the land is mine, for ye are strangers and sojourners with me."† Under the laws of Moses, therefore, lands were strictly hereditary and any absolute alienation thereof was prohibited except in walled cities. No lands outside of the walled cities could be transferred for a longer period than fifty years; for every fiftieth year was the year of Jubilees in which the trumpet was sounded throughout all the land in proclamation of liberty unto all the inhabitants thereof, and it was ordained that every man should then return "unto his possession." So all sales were made with reference to this return on the part of the vendor or his heirs; and even in walled cities any man might redeem his dwelling-house within one year after sale.‡ "Now this was the manner in former time in Israel concerning redeeming and concerning changing, for to confirm all things; a man plucked off his shoe, and gave it to his neighbor: and this was a testimony in Israel"—as we learn from the book of Ruth.‡ This ceremony appears to have been performed in the presence of the elders and all the people, who were called upon to be witnesses of the transaction, and was thus akin to and perhaps the original of the feudal livery of seisin.

Oriental research has shown that the art of writing was known and employed centuries before the date of Abraham, but I am unable to state at what early period deeds began to be made. We know, however, that lands were transferred by regular instruments of conveyance, signed, sealed and delivered, in the days of Jeremiah, about 600 B. C. For he describes the ceremonies employed when he "bought the field of Hanameel," during one of his periods of imprisonment. He "subscribed the evidence" of purchase, "and sealed it, and took witnesses, and weighed him the money in the balances," "even seventeen shekels of silver."‡ It was customary to make two copies on clay tablets; the original being placed in a sealed cylinder of clay, and the copy being inscribed on the outside of the cylinder. Thus, if the copy ever became defaced, or if any dispute arose as to the text, the cylinder was broken and the original was brought to light. This is the explanation of the rest of the story told by Jeremiah: "So I took the evidence of the purchase, both that which was sealed according to the law and custom, and that which was open: And I gave the evidence of the purchase unto Baruch the son of Neriah, the son of Maaseiah, in the sight of Hanameel mine uncle's son, and in the presence of the witnesses that subscribed the book of the purchase, before all the Jews that sat in the court of the prison. And I charged Baruch before them, saying: Thus saith Lord of Hosts, the God of Israel; take these evidences, this evidence of the purchase, both that which is sealed and this evidence which is open; and put them in an earthen vessel, that they may continue many days."§

In the solemn and impressive style of the Book of Law it was written: "Cursed be he that removeth his neighbor's landmark. And all the people shall say, Amen."** Therefore, this injunction found a place among the proverbs of the Wise Man: "Remove not the ancient landmarks which thy fathers have set."††

* (Gen. 4, 23. † (Lev. 25, 23.) ‡ (Lev. 25.) ‡ (Ruth 4, 7.) ‡ (Jer. 32, 9-12.) § (Jer. 32, 9-13.) ** (Deut. 27, 17.) †† (Prov. 22, 28.)

In Egypt, where civilization had flourished for centuries and some of the Pyramids were already hoary with age when Abraham journeyed thither in the lifetime of the lovely Sarah, lands are said by Diodorus to have been originally allotted by King Sesostris to the military; and Herodotus relates that each of the 410,000 soldiers of the kingdom was given twelve arurae or about nine acres of land.* This smacks of feudalism, and so we are told by Prof. Hilprecht, who is perhaps the greatest living authority on the subject, that in the eleventh dynasty "the sort of patriarchal government exercised by the old empire had been replaced by feudalism."† It may be interesting to add that this diligent explorer and profound oriental scholar, speaking in the light of latest researches, has said: "Egyptian civilization, so far as we know at present, has no beginning; the farther back we go, the more perfect and developed we find it to have been."‡

Professor Maspero tells us that among the Chaldaeans theoretically the earth belonged to the gods, and under them to the kings, who made concessions of lands to their vassals; so that "the greater part of their domains were always in the hands of the nobles or private individuals." These held under a tenure of rents, apparently similar to the quit-rents of the days of our fathers. The best of our modern methods seem to have prevailed among this wonderful people. For, says this scholar: "A survey of the area of each state had been made at an early age, and the lots into which it had been divided were registered on clay tablets containing the name of the proprietor as well as those of his neighbors, together with such indications of the features of the land, dykes, canals, rivers, and buildings as would serve to define its boundaries; rough plans accompanied the description, and in the most complicated instances interpreted it to the eye. This survey was frequently repeated, and enabled the sovereign to arrange his scheme of taxation on a solid basis, and to calculate the product of it without material error."§

We learn from the same authority, that "landed property was placed under the guardianship of the gods, and its transfer or cession accompanied by formalities of a half-religious, half-magical character." Muniments of title were inscribed on hard stones, like flint or basalt, which appear to have been used as landmarks. A portion of one of these Chaldaean deeds—the warranty clause—has been translated as follows:

"If ever, in the course of days, any one of the brothers, children, family, men or women, slaves or servants of the house, or any governor or functionary whatsoever, arises and intends to steal this field, and remove this landmark, either to make a gift of it to a god, or to assign it to a competitor, or to appropriate it to himself; if he modifies the area of it, the limits and the landmark; if he divides it into portions, and if he says: 'The field has no owner, since there has been no donation of it;'—if, from dread of the terrible imprecations which protect this stele and this field, he sends a fool, a deaf or blind person, a wicked wretch, an idiot, a stranger, or an ignorant one, and should cause this stele to be taken away, and should throw it into the water, cover it with dust, mutilate it by scratching it with a stone, burn it in the fire and destroy it, or write anything else upon it, or carry it away to a place where it will be no longer seen,—this man, may Anu, Bel, Ea, the exalted lady, the great gods, cast upon

* (Rawlinson's History of Ancient Egypt.) † (Recent Research in Bible Lands, p. 100.) ‡ (Recent Research in Bible Lands, p. 102.) § (Dawn of Civilization.)

him looks of wrath, may they destroy his strength, may they exterminate his race."*

In further explanation of these imprecations, Prof. Maspero says:

"All the immortals are associated in this excommunication, and each one promises in his turn the aid of his power. Merodach, by whose spells the sick are restored, will inflict upon the guilty one a dropsy which no incantation can cure. Shamash, the supreme judge, will send forth against him one of his inexorable judgments. Sin, the inhabitant of the brilliant heavens, will cover him with leprosy as with a garment. Adar, the warrior, will break his weapons. Zamama, the king of strifes, will not stand by him on the field of battle. Ramman will let loose his tempest upon his fields, and will overwhelm them. The whole band of the invisibles hold themselves ready to defend the rights of the proprietor against all attacks. In no part of the ancient world was the sacred character of property so forcibly laid down, or the possession of the soil more firmly secured by religion."†

In order that we may appreciate the antiquity of the Chaldaean civilization, we may note that Eridu, described by Prof. Sayce as the seaport of primitive Chaldea, is supposed by him to have been founded no less than 6500 years B. C.—a calculation based upon the growth of land at the head of the Persian gulf, which has left the ruins of the ancient city far from its original maritime site.‡

We are indebted to Mr. Basil T. A. Evetts, formerly of the Assyrian Department of the British Museum, for the following translation of a deed executed during the reign of Evil-Merodach, the son of Nebuchadnezzar and his successor to the throne of Babylon in the year 562 B. C., being a conveyance from one Ramman-nasir to one Marduk-akhi-usur, to whom it had been previously mortgaged by the vendor. Listen:

"A piece of land, consisting of five measures of corn-land, a field, meadow, and a palm-garden, adjoining the corn-field of Itri-Saktum, in front of the gate of the Sun-god, in the suburbs of Babylon. Its measurements are:

"336⅔ cubits on the upper western side, adjoining the property of Zilla, son of Nur-Sin;

339 cubits on the lower eastern side, adjoining the property of Rimut-Bel, son of Bel-uballit, son of Sin-shadunu;

"128 cubits, 20 fingers on the upper northern side, adjoining the road. * * *

"126 cubits, 20 fingers on the lower southern side, adjoining the property of Rimut, son of Nadin, son of Sin-kudurnu.

"Total: 5 measures of corn-land and 1 measure of pasture-land.

"During the years from the 32nd year of Nebuchadnezzar, king of Babylon, Marduk-aki-usur, son of Marduk-ibni, the king's officer, has held the land as pledge for three manehs of silver, at the hands of Ramman-nasir, son of Apla, son of the priest of Rimmon. Afterwards, in the second year of Evil-Merodach, king of Babylon, Marduk-akhi-usur, son of Marduk-ibni, the king's officer, has declared and reckoned the full value of the land as 3½ manehs, 6 shekels of pure silver, and has deposited 5¼ shekels of silver in addition.‡ The total price, 3⅔ manehs, 1 shekel, 3 ud of pure silver. Ramman-nasir, son of Apla, son of the priest of Rimmon, has re-

* (Dawn of Civilization.) † (Dawn of Civilization.) ‡ (Babylonians and Assyrians, p. 2.) ‡ (This was the "backsheesh" customary in eastern countries, of which you may still hear in the Orient.)

ceived the full price of the land in silver, at the hands of Marduk-akhi-usur, son of Marduk-ibni, the king's officer.

"In the presence of the Royal Scribes, in the city of Ipkida, the tablet has been sealed, and Marduk-akhi-usur has paid the price.

"Witnesses: Bel-iddin, son of Sitillu, son of the chief architect; Nabu-etir-napshati, son of Shamash-nasir, son of Nur-Sin; Nabu-iddin, son of Mushallim, son of the sword-bearer; Mushezib-Marduk, son of Nabu-paliddin, son of Dabibi. * * * * *

"Besides the male witnesses of the tablet of Marduk-akhi-usur, Saggil-namrat, daughter of Ramman-nasir, and wife of Uballit-Marduk, sat as witness.

"Ramman-takul, son of Ramman-nasir, son of the priest of Rimmon, has received three shekels of stamped (?) silver at the hands of Marduk-akhi-usur, and sat together with the witnesses.

"Scribe: Nabu-shar-usur, son of Zirutu, son of Marduk-shakin-pushu.

"Babylon, month of Tammuz, 15th day, 2nd year of Evil-Merodach, king of Babylon.

"Nail-mark of Ramman-nasir, son of Apla, son of the Priest of Rimmon, in place of his seal."*

Available information concerning the land laws of Greece is meager and far from satisfactory. This wonderful land was so rich in literature, philosophy, and art that its own authors, as well as more modern writers, appear to have been absorbed by these subjects to the exclusion of the less interesting details of law. It has been pointedly remarked by an eminent historian that one of the most provoking omissions of classic writers is their failure to mention many things which must have been within their knowledge. And this seems to be the case concerning the tenure and transfer of titles to lands. Most that we know upon these subjects is grouped around the laws of Lycurgus in Sparta and those of Solon in Attica; though Aristotle touches upon the subject generally in the following paragraph:

"The ancient laws of many states which aimed at making the people husbandmen were excellent. They provided either that no one should possess more than a certain quantity of land, or that, if he did, the land should not be within a certain distance of the acropolis. Formerly in many states there was a law forbidding any one to sell his original allotment of land (Op. II, 7, §7). There is a similar law attributed to Oxylus, which is to the effect that there should be a certain portion of every man's property on which he could not borrow money."†

And the same writer elsewhere says: "Laws were made by Solon and others prohibiting an individual from possessing as much land as he pleased; and there are other laws in states which forbid the sale of property. Among the Locrians, for example, there is a law that a man is not to sell his property unless he can prove unmistakably that some misfortune has befallen him. Again there have been laws which enjoined the preservation of the original lots. Such a law existed in the island of Leucas, and the abrogation of it made the constitution too democratic, for the rulers no longer had the prescribed qualification."‡

In Sparta, says Hon. Woodrow Wilson, the state was regarded as the original proprietor of the soil, and individual tenure was in the nature of a

* (New Lights on Bible Lands.) † (Aristotle's Politics, VI. 4, §§ 8, 9.) ‡ (Aristotle's Politics, II, 7, 6, &c.)

usufruct. "No landed estate could be alienated either by sale or testament from the family to which the state had assigned it unless express legislative leave were given."* Other respectable authors also assert that the laws of Lycurgus did not permit the devise of lands, but the historian Grote advances strong arguments to the contrary. After sifting the evidence with apparent thoroughness he accepts the statements of Aristotle as most trustworthy, to the effect that although it was considered dishonorable or disgraceful among the Lacedaemonians to sell or buy lands, yet they might be given away or freely devised.† According to Plutarch, Lycurgus divided Laconia into 39,000 portions, whereof 9,000 were allotted to the Spartan citizens and 30,000 to the Perioeki, or dwellers around the city. But some writers have taken the ground that this supposed Lycurgan measure was confused by Plutarch with the later movement of a similar sort in Sparta.

In Attica mortgages were evidenced by stone pillars erected on the land and inscribed with the name of the lender and the amount of the loan; and the country is said to have resembled a vast grave-yard when Solon was called to reform the laws. He is reported to have found such an unequal distribution of land and wealth that he considered it advisable to abolish all debts, both to the state and among individuals, and declared all existing mortgages on lands to be void. He has been charged with having shown this proposed law before its enactment to some of his friends, who forthwith bought large tracts of land for which they refused to pay when the law was promulgated, thereby enormously enriching themselves at the expense of their victims. But Aristotle undertakes to vindicate his character from this aspersion, and pronounces the charge a calumny; and there is evidence to show that Solon himself lost heavily by the law, since he had a considerable amount of money invested in mortgages. He divided the citizens of Attica into four classes, giving them rank according to the annual income received from lands; and those owning no lands were placed in the fourth class, however worthy they might be, regardless of their income from personal property or trade.‡ Some eminent authors, says Grote, suppose Solon "to have abolished villenage and conferred upon the poor tenants a property in their lands, annulling the seignorial rights of the landlord. But this opinion rests upon no positive evidence, nor are we warranted in ascribing to him any stronger measure in reference to the lands than the annullment of the previous mortgages."‡

Prior to the laws of Solon, there seems to have been no right to devise lands in Attica, and the inheritance remained by law in the same family. But by his reforms the devise of lands was permitted in Attica, with certain restrictions for the protection of children.

A passage from one of the orations of Demosthenes, touching the law of devises, has been quaintly translated, as follows: "All genuine citizens whose estates were impaired by litigious suits when Solon entered the praetorship, shall have permission of leaving their estates to whom they will, admit they have no male children alive, or themselves be not crazy through the infirmities of old age, the misery of a distemper, or the enchantments of witchcraft; or if they be not henpecked, or forced to it by some unavoidable necessity."‡

* (Wilson's, "The State," §§ 105 and 1498.) † (Grote's History of Greece, Vol. II.) ‡ (Abbott's History of Greece, 410.) ‡ (Grote's History of Greece, III., 179-180.) ‡ (Demosthenes in Stephanum Testem, Orat. II. Potter's Antiquities of Greece, Vol. I., p. 205.)

Under the laws of the XII. Tables of Rome, promulgated B. C. 451-449, there was no restraint upon devises; and adverse possession for two years conferred good title to lands *quoad* private individuals, unless the possession had been obtained by force or fraud. No distinction appears to have been made in the sales of realty and personalty, title to both passing by delivery or *mancipatio*, verbally, in the presence of witnesses. Nor was any distinction made in the law of succession, the real and personal estate of decedents passing in case of intestacy equally to his widow and children *in potestate;* or, if none, then to the *gens*. The *paterfamilias* had full power to regulate succession by testament, even to the total disinheritance of his children.

These principles were preserved in the Code of Justinian, who abolished the distinctions that had arisen in the course of a thousand years, between *res mancipi* and *res nec mancipi*, and placed the transfer of realty and personalty on exactly the same footing. But he changed the statute of limitations so that title to personalty matured by three years' possession, and title to realty by ten years of adverse possession against residents of the same province and twenty years against non-residents.

With the fall of Rome the civil law also fell beneath the tramp of her rude conquerors, and was for ages buried and forgotten. The rough northern nations brought with them their own customs, and gradually the feudal tenures were spread over Europe. Born of military necessities, the fundamental principle of this tenure is the relation of lord and vassal; and originally the chief incidents were the inalienability of the land, and the rendition of military services therefor. This was well enough in days of plunder, rapine and disintegration, but when the destructive work of arms began to exhaust the world and men commenced to turn their thoughts to peace and progress, then feudal fetters began to gall. Says Chancellor Kent:

"The whole feudal establishment proved itself eventually to be inconsistent with a civilized and pacific state of society; and wherever freedom, commerce, and the arts penetrated and shed their benign influence, the feudal fabric was gradually undermined, and all its proud and stately columns were successively prostrated in the dust."* But this triumpph of freedom, commerce, and the arts has been very slow and is not yet perfectly achieved even in America.

Saxon liberties and the precious heritages of his race, save its indomitable spirit and a few relics in the doughty county of Kent, fell with Saxon Harold on the hill of Hastings; though it was not until about 1086 that the feudal tenures were established in England by the Norman Conqueror. The accomplished chancellor from whom I have already quoted, in treating of the feudal system in another portion of his works, says: "Except in England, it annihilated the popular liberties of every nation in which it prevailed, and it has been the great effort of modern times to check or subdue its claims, and recover the free enjoyment and independence of allodial estates."† But the great English commentator, at whose feet every student before me has sat in reverent admiration, tells us that "the Norman interpreters, skilled in all the niceties of the feodal constitutions * * * * took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known

* (IV. Kent's Com. 443.) † (III. Kent's Com. 501.)

to other nations; as if the English had, in fact as well as theory, owed everything they had to the bounty of their sovereign lord." And after recounting some of the charters wrung by force from tyrannical kings in the struggles of bitter years, he add: "that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of Norman arms."* This eloquent writer and profound lawyer conferred an inestimable blessing upon his race by his sincere love of liberty and masterful exposition of its foundations in the English constitution, and it is well for us even in this day and generation to revert to the original and unalterable principles of freedom taught by him. After describing the "qualities, fruits, and consequences" of the feudal tenures he declares: "A slavery so complicated and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom."† The great curses were, the inalienability of lands and burdens of uncertain personal services and taxes under the name of aids, reliefs, primer seisin, profits of wardship and marriage, fines for alienation, and escheats—all of which, except personal services and the profits of marriage that now go wholly to the contracting parties and not to any lord or guardian in chivalry, still exist in reality though not in name, to a greater or less extent, under the operation of our laws This statement may seem surprising, but will be made plain by brief consideration. Chancellor Kent says: "The only feudal fictions and services which can be presumed to be retained in any part of the United States consist of the feudal principle, that the lands are held by some superior or lord, to whom the obligation of fealty, and to pay a determinate rent, are due."‡ But it can be readily demonstrated that this statement should be enlarged. The "superior" to which the learned Chancellor refers is, of course, the state, which exercises over all lands the right of eminent domain. The "determinate rent" is the taxes imposed and collected by the government. The latter correspond to one of the more modern burdens of the feudal "aid." For in the discussion of this feature of feudal tenures, Mr. Blackstone says: "But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more: as, aids to pay the lord's debts"—which is the object of taxation.‡ The "relief" was a fine or composition levied by the lord whenever an estate passed by death; and we still have this burden attached to real estate in the shape of inheritance taxes in the case of descent, or the tax on wills in case of devise. "Primer seisin" was an additional relief, and is now also represented by the taxes just mentioned. The burdens of "wardship" might be said to be represented, in many cases, by the costs of chancery—but, let that pass! The feudal "fine," which was due the lord upon every alienation, is now felt in the tax on deeds—to which the layman might fancy we should add the ever-recurring costs of conveyance, a tribute which even venerable and respectable custom cannot render altogether delightful. The last of the seven feudal fruits is "escheat," and that incident as we well know is still appurtenant to lands as one of the prerogatives of our state government.

It was not until 18 Ed. I. in the year 1290, more than 200 years after the introduction of feuds, that lands were permitted to be aliened by

* (2 Blackst. Com. 51, 52.) † (2 Bl. Com. 76.) ‡ (3 Kent's Com. 510.) ‡ (2 Bl. Com. 64.)

the living without the consent of their feudal lords by virtue of the statute known as *Quia emptores terrorum*, the land, however, to be held not of the grantor but of the chief lord of the fee; and more than four centuries and a half had to come and go before the estates of dead men could pass by devise under the *Statute of Wills* enacted in 1541 in the thirty-second year of Henry VIII.

Lord Bacon strongly advocated the abolition of wards and tenures in the reign of James I., and it seems that the king was brought to the willingness of yielding all except his prerogative rights of wardship and marriage. But the fight was not pressed with sufficient determination in the Houses of Parliament, and it was not until the great upheaval that resulted in the decapitation of Charles I. and the temporary establishment of the so-called Commonwealth under the protectorate of Cromwell, that the times became ready for action. The real fruit of the great English Revolution was the Statute of 12 Car. II. c. 24, passed in 1660, abolishing *Tenure in Chivalry*, the most oppressive of the feudal tenures, and enacting: "that the court of wards and liveries, and all wardships, liveries, primer seisin, and ousterlemains, values, and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knight service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty."

This was such a grand step forward that even when Mr. Blackstone delivered his famous Oxford lectures one hundred years later, his eyes were dazzled by the brilliancy of the event and he wrote and spoke as if nothing more could be desired! In glowing terms he eulogized this Act as "A statute which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor, but the statute of King Charles extirpated the whole and demolished both root and branches."

The reign of this monarch was further signalized by the great Act of 29 Car. II. c. 3, passed in 1678 and commonly known as the "Statute of Frauds and Perjuries," by which, for the first time in England, deeds were required for the conveyance of freehold estates—a method which has now totally supplanted the ancient common law livery of seisin. But as we look back it seems remarkable that the "Statute of Grants," abolishing the distinction between the conveyance of corporeal and incorporeal hereditaments and permitting the creation of estates *in futuro* in lands by deed, was not passed until 8 and 9 Vict. c. 106 in the comparatively recent year of 1845; and was not adopted in Virginia until the Code of 1849, which went into effect on the first day of July, 1850. But it may here be remarked that Virginia began her registry system nearly forty years before the great "Statute of Frauds."

We do not know exactly when civilization began in America, for the exploration of our buried historical treasures may be said still to be in its infancy. But evidences of the most unexpected conditions of primeval art and cultivation have been discovered, and the world may yet be startled by the disclosures of the future. Among other things, our antiquarians

have informed us that a feudal policy existed in its most rigid form with the ancient Mexicans.*

The first permanent English settlement on this continent was made at Jamestown, in the dominion of Virginia, under the charter granted by King James I. on April 10, 1606, in the fourth year of his reign, to Sir Thomas Gates and Sir George Somers, knights, and certain esquires, gentlemen, and "divers others of our loving subjects" described as "merchants and other adventurers of our city of London and elsewhere." This charter contained a covenant on the part of his majesty "that we, our heirs and successors, upon petition in that behalf to be made, shall, by letters, patent under the great seal of England, give and grant unto such persons, their heirs and assigns, as the Council of that Colony, or the most part of them, shall, for that purpose nominate and assign, all the lands, tenements, and hereditaments, which shall be within the precincts limited for that colony, as is aforesaid, to be holden of us, our heirs, and successors, as of our manor of East-Greenwich in the County of Kent, in free and common socage only, and not in capite."† In this charter there was a reservation to the Crown of the fifth part of all gold and silver and the fifteenth part of all copper that might be gotten or had in the colony. The next charter was granted by the same king on May 23, 1609, to the "Treasurer and Company for Virginia," extending the domain along the Atlantic coast four hundred miles both north and south of "the point of land called Cape or Point Comfort," and including within it all the land "from sea to sea" and all the islands within one hundred miles of the said coast. The tenendum was the same as that of the first charter, but the fact was emphasized that the grant was made "of our special grace, certain knowledge and mere motion."‡ A third charter from the same king on March 12th, 1611-12, extended the grant to islands within three hundred leagues of the continent, upon the same tenure.

In 1624 these charters were dissolved, all the rights and powers of the Virginia Company were resumed by the crown, and no more charters were granted until the accession of Charles II. On October 19th, 1675, this monarch approved the petition of the colony for a new charter, agreeing that one of the articles thereof should provide for an exemption of taxation without the consent of the governor, council and burgesses, and instructed Mr. Attorney General and Mr. Solicitor General to prepare the letters patent for the grant. But the news of Bacon's rebellion stopped it in the Hamper office, and nothing was done until October 10th, 1676, when my lord Culpeper, who had been appointed governor on the death of Sir William Berkeley, obtained the last royal charter of the colony. This is depicted by Hening as "a miserable skeleton, containing little more than a declaration of the dependence of the colony on the crown of England."‡

Looking at these charters as muniments of title, it appears that the early English tenures in this country were by *free and common socage*, which Blackstone declares to have "sprung from the same feodal original as the rest." And as the common law and all the general statutes or Acts of Parliament prior to 4 Jac. I., so far as not repugnant to our Bill of Rights and Constitution, have always been in force in Virginia and West Virginia, our law has necessarily always been deeply impregnated with feudal principles. But it was not only from "the subtlety and finesse of the Norman lawyers" that our English and colonial ancestors had to suffer.

* (Robertson's History of America, C. 7, Vol. II., 280.) † (I. Hen. Stat. at Large 55-56.) ‡ (I. Hen. Stat. at Large 80.) ‡ (II. Hen. Stats. at Large 519, 531-2.)

For in 1285 the statute 13 Ed. I. c. 1, better known perhaps as the Statute Westminster II. "*De Donis Conditionalibus*," gave rise to *estates-tail*, which fastened another condition of inalienability upon lands; "so that they were justly branded," says Mr. Blackstone, "as sources of new contention, and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm."* Sir William Herle, sometime Chief Justice of the Court of Common Pleas, said that "they were sage men that made this statute,"† and the nobility heartily agreed with him because it enabled them to keep their estates in their families free from forfeiture. No means was found to evade the provisions of the statute until 12 Ed. IV., 1473, when *Taltarum's Case* was decided, under the direction and personal influence of the monarch. This decision has been characterized by Chancellor Kent as "a bold and unexampled stretch of the power of judicial legislation" to grant relief from "a great national grievance."‡ But it only came after king and commons had been struggling for two hundred years to break the meshes thrown around the transfer of lands for the benefit of the barons. And after all, it was only a partial relief dependent upon the action of the land owner by the complicated proceeding known as *common recovery* based upon fictions of law and made up of "such awkward shifts, such subtile refinements, and such strange reasoning" as would not be tolerated in the jurisprudence of our day. We learn from Hening that "in June, 1619, the first assembly ever held in Virginia was convened by Sir George Yeardley, then governor, and met at James Town; which was at that time, and for many years afterwards, called James City."§ The first statute passed in the colony relating to lands was that of March, 1623-4, 21 Jac. I., which provided:

"13. That every private planter's devident shall be surveyed and laid out in several and the bounds recorded by the survey; if there be any pettie differences betwixt neighbors about their devidents to be divided by surveyor if of much importance to be referred to the governor and counsell: the surveyor to have 10 lbs. of tobacco upon every hundred acres."‡

This Act was repeated in 1631-2 and in the First Revisal of 1632.§ In January, 1639-40, 14 Car. I., another Act was passed, as follows:

ACT XVI.

"A deed or mortgage made without delivery of possession to be adjudged fraudulent unless entered in some court."**

These statutes are quoted in full because they constitute the first link in the registry system of Virginia and disclose at what a distant date the commonwealth entered upon that policy.

The earliest mode of acquiring lands in Virginia was by petition to the general assembly, says Mr. Jefferson. Title was passed by vote, if the land appeared to be clear of Indian claims. If, however, it had not yet been ceded by the Indians, the petitioner was required to purchase of them; and when such purchase had been verified by the assembly upon inquiries of the Indian proprietors, the grant was then made and the title confirmed by act of the assembly. The Virginia Company also sometimes, though very rarely, granted lands independently of the general assembly. But as the colony increased and applications for lands multiplied, these primitive methods were found to be too slow and cumbrous, and the assembly formulated general rules for the grant of lands.†† Acts were passed

* (2 Bl. Com. 116.) † (9 E. 3, 22.) ‡ (4 Kent's Com. 13.) § (1 Hen. Stats. at Large, 119.) ‡ (1 Hen. Stats. at Large, 125.) § (Do. 173, 197.) ** (1 Hen. Statutes at Large, 227.) †† (Jefferson's Notes on Virginia, 262-4.)

from time to time prohibiting private purchases from Indians, and in March, 1655-6, Indian lands were declared not alienable by them without assent of the assembly.* In 1639-40, 14 Car. I., the first Act was passed in Virginia concerning Quit Rents, which were made payable yearly at 2 S. per hundred acres, beginning seven years after the date of each patent.† In 1644-5, 19 Car. I., the first Act was passed in Virginia for the forfeiture of patents on account of abandonment of plantations. Under this statute deserted lands could be taken up by any person.‡ In 1646, 21 Car. I., the first Act was passed in Virginia on the subject of Adverse Possession, barring all suits for lands in peaceable possession unless brought within five years, but saving the rights of "orphans" for five years after coming of age.‖ It was not until 1657-8 that a like saving was made in favor of femes covert and persons of unsound mind.‡ In 1661-2, 14 Car. II., the first Act was passed in Virginia on the subject of Processioning, it being recited that "many contentious suits are dayly incited and stirred up about the bounds of land for which noe remedy hath yett bin provided."§ In 1705, 4 Anne, "An Act concerning the Granting, Seating, and Planting, and for Settling the Titles and bounds of Lands; and for proventing unlawful shooting and ranging thereupon" was passed. This was the first general land law passed by the general assembly of Virginia, and is the basis of all subsequent land laws in the commonwealth. This Act provided that no estate of inheritance, in lands or other hereditaments, in fee simple or fee tail, general or special, nor any freehold estate, should take effect except by indenture duly acknowledged and recorded in the records of the general court or of the county court where the land lies; the record to be made within eight months by residents and within two years by non-residents, after sealing and delivery. The Act also required livery of seisin to be recorded; and under it unrecorded deeds were void *even as to parties*, though in actual possession, as they had been since the Act of December, 1656,†† and continued to be until the Act of 1734.‡‡ This Act also provided that estates-tail should hereafter be inalienable in Virginia *except by Act of assembly*.§§ The next general land law was passed in 1710, 9 Anne, and provided that lands should be forfeited by failure to pay quit rents for three years as well by failure to seat and plant. It also contained a provision for compulsory processioning and declared that processioning three times should settle bounds unalterably, save as to infants, reversioners, and remaindermen.‖‖ In 1734, 8 George II., an Act was passed amending that of 1710, making unrecorded deeds good between the parties though void as to creditors and subsequent purchasers for value and without notice, and permitting the alienation of fee-tail estates by deed without Act of assembly in the case of lands judicially ascertained to be worth less than £200. This provision was made, says the statute, because the method of defeating entails by special act of the general assembly had "been found, by experience, so expensive to poor people seized in fee-tail of small and inconsiderable parcels of land, that they are not able to go through it; and therefore the docking entails by easier methods, will be a great relief to such poor people and their families, who, without it, must be confined to labor upon such small parcels of land, when, by selling them, they might be enabled to purchase slaves and other lands more improveable."¶¶ May

* (1 Hen. Stats. at Large, 396.) † (1 Hen. Stats. at Large, 226.) ‡ (1 Hen. Statutes at Large, 291.) ‖ (1 Hen. Statutes at Large, 331.) ‡ (1 Do. 451.) § (2 Do. 101-102. †† (1 Hen. Stats. at Large, 417.) ‡‡ (4 Do. 397.) §§ (3 Hen. Stats. at Large, 318, &c.) ‖‖ (3 Hen. Stats. at Large, 532-4.) ¶¶ (4 Hen. Stats. at Large, 397.)

we not well ask ourselves whether it would not be of advantage to the "poor people" of this day and generation to remove some of the difficulties and dock some of the heavy costs still attending every transfer of land under our present laws?

The only other colonial statute of general importance to our subject is that of October, 1748, 22 George II., which, however, introduced no new provisions that need be now noted.* In 1774, a young Virginia lawyer who had been elected a member of the colonial convention called in consequence of the dissolution of the general assembly by Lord Dunmore, the royal governor, being overtaken by sickness on the road, sent to the convention a manuscript he had prepared for the occasion, entitled, "A Summary View of the Rights of British America Set Forth in Some Resolutions Intended for the Inspection of the Present Delegates of the People of Virginia now in Convention: By a Native and Member of the House of Burgesses." This paper made a profound impression and at once placed Thomas Jefferson in the front rank of American patriots. It was published by the convention and created a tremendous stir in England, where it was freely used by the eloquent Edmund Burke in parliamentary debates. Among other things it contained an able argument to prove that inasmuch as this country had never been conquered by William the Norman, nor our lands surrendered to him or any of his successors, possessions here were of right undoubtedly allodial and the feudal system should have had no foundation in law or fact; but that our ancestors being farmers and not lawyers had ignorantly yielded the point and taken grants of their own lands from the crown. Where rents were reasonable, said the writer, there was no inducement "to arrest the error and lay it open to public view;" but that the charges having now been doubled, the acquisition of lands having been rendered difficult and the population of the country likely to be checked: "It is time, therefore, for us to lay this matter before his majesty, and to declare that he has no right to grant lands of himself."† A few more years rolled by, and Lexington, Concord, Moultrie, and Bunker's Hill had become historic names. The pen of the young Virginian had embodied the spirit of the times into an immortal "Declaration of Independence;" a new nation had been born, and he deliberately left the halls of congress to devote his great gifts to the upbuilding of that commonwealth upon which he had helped to confer a noble sovereignty. He again took his place in the general assembly of Virginia, and his first motion on October 11, 1776, was to introduce a bill for the establishment of a judiciary system. But the very next day, "on October 12th, 1776," says he, "I obtained leave to bring in a bill declaring tenants in tail to hold their lands in fee-simple." This was the first Act abolishing estates-tail in America. But that was just the beginning of his reforms, for on October 24th, 1776, he secured the passage of a bill for the appointment of a committee to revise all the laws. This committee originally consisted of Edmund Pendleton, George Wythe, George Mason, Thomas L. Lee and Thomas Jefferson. They were appointed November 5, 1776, and held their first meeting at Fredericksburg on January 13, 1777; there Mason and Lee resigned, doubtless because they soon became convinced that they were unfit for the work by reason of the fact that they were not lawyers. After some discussion of general principles, the labors of the commission were partitioned among the three remaining members and the committee ad-

* (5 Hen. Stats. at Large, 403.) † (Writings of Thomas Jefferson, Vol. I., pp. 443-4.)

journed. A second meeting was held at Williamsburg in February, 1779, and the final result of their work was reported to the general assembly on June 18, 1779. Some of the bills were passed at that session, but many were not enacted until 1785, after the great war of the Revolution had ended in victory, and peace had been restored. In the meantime, however, quit rents had been abolished by the Act of October, 1777, except on the Northern Neck;* and feudal tenures were finally swept away by the great Act of May, 1779, for "establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands."

Speaking of the first meeting of the committee for general revision of the laws in January, 1777, Mr. Jefferson says:

"I proposed to abolish the law of primo-geniture, and to make real estate descendible in parcenary to the next of kin, as personal property is, by the statute of distribution." This was the rule of the civil law, and the principle announced commends itself as a rule of reason to be extended to transactions with real estate. Justice and expediency alike suggest that, as far as possible, lands should be made as readily transferrable as personal property. "Experience hath shown," says Mr. Blackstone, "that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained."

It is an undisputable fact that the age in which we live is dominated by commercial principles, and that our country above all others is permeated with the commercial spirit. Indeed we may be said to live and move and have our being almost wholly in a commercial atmosphere. But not even the most confirmed admirer of existing laws can say or imagine that the transfer of realty is "totally free and unrestrained," though this class of property is the basis of all wealth. Your lands in 1890 were assessed at $121,202,365, and your personalty at $65,762,405. Thus the value of your realty was nearly twice as great as the value of all personal property returned for taxation in the state, and it is a matter of no little consequence to the trade and prosperity of your country that your lands should be made the subject of commercial dealings in the most free and unrestrained manner possible.

The question of land transfer is one of the greatest moment not only to West Virginia but to every state in the Union. The proper solution of the problem depends upon the practical combination of four elements:

1. Certainty of title,
2. Certainty of transfer,
3. Celerity of transfer,
4. Cheapness of transfer.

Not one of these elements is guaranteed, and not one of them obtains, under the present laws of Virginia or West Virginia. We have been taught to rely upon our so-called registry system. But every lawyer knows that there are many things that may affect or even avoid titles, which do not appear of record; among which may be mentioned title by adverse possession, by descent, by marriage, by decree of court, and by unrecorded deed, will, and judgment within the period allowed for recordation. The doctrine of constructive notice has been carried so far that in Virginia it is not even necessary that a deed should be actually recorded or actually indexed at all. They are binding and serve as constructive notice to all the world

* (9 Hen. Stats. at Large, 349, 359.)

from the time when lodged for record with the clerk.* Every lawyer knows that our present system affords no proof of the genuineness of signatures to deeds, thus rendering forgeries easy; that it affords no evidence of the identity of parties, and that unless the examiner happens to know them personally he is forced to rely upon the seeming identity shown by the index to deeds, though there may be many "John Smiths;" that it affords no proof of the delivery of the deed, which may have been executed as an escrow; and that no proof is afforded of the legal capacity of the parties at the time of delivery. Every lawyer also knows that there is no certainty about boundaries under our present system. The difficulty of locating lands by deed and even by survey is frequently insuperable, on account of vague descriptions and perishable monuments of metes and bounds. Moreover, conflict of patents and interlocks will not appear by ordinary examination. The chain may be faultless while the original link is worthless. Then, too, indexes are imperfect, and fatal mistakes may be made by reason of omissions and other defects. And doubtless there is not a lawyer before me who has not "shivered and shook," or grunted and groaned—or emphasized his feelings in a way not altogether Scriptural—when he found that he had to trace a title through the proceedings of a suit. Truly he then realizes what it is to be "in chancery." For we all know that "court titles"—those passing through suits—are the most vexatious and uncertain of all. Questions of proper parties and procedure must be determined by each examiner, and the nicest problems of the law may be encountered at every step. These are some of the evils of our present system. Its vice lies in the fact that only *evidences of title* are required to be recorded; and in the further fact that some circumstances may control title without any record whatever. These are the prolific roots of its serious defects and hurtful consequences. For thus arises the necessity for ceaseless examinations of title, entailing costly delay and heavy expense in every transfer of lands. Thus are all titles made dependent upon the *opinion* of each examiner. Doubts may be raised and clouds cast by any tyro, and the title and market value of every man's property may be at the mercy of any irresponsible examiner. One may buy on the opinion of an expert and be prevented from selling by the opinion of a novice. In addition to this, the difficulties, dangers and costs of examining titles grow with increasing records, and land is placed in the clutches of a perpetual tax fostered by the law and rendered more and more voracious by the growth of years. And, to cap the climax of improvident and unmerited oppression, even after submission to every labor, cost, and delay, no certainty of title can be attained, with rare exception; and absolutely none can be maintained. Though every defect be cured, every cloud removed, and all questions of title be even judicially settled to-day, the vice of the system remains and other clouds may arise to-morrow. The fountain contains the germs of disease, and all who drink from its stream may suffer from the draught. I say the present laws are "oppressive," because they tend to prevent free dealings in real estate; and I say they are "improvident" because they tend to check immigration and retard the development of the state. It is no exaggeration to say that millions of dollars have been actually lost by bad titles and that millions have been diverted by the fear of them, in your state and mine; that many enterprises "of great pith and moment" to prosperity have been thwarted; and that many valuable additions to our population have been prevented.

* (Va. Bldg. & Loan Co. vs. Glenn and others, 99 Va. 460.)

I am persuaded, therefore, that no more important question can engage the best thought and energies of the leading men of Virginia and West Virginia than that of reform in our land laws.

Fortunately, it will not be necessary to resort to doubtful experiments. Knowing the evils to be corrected, and knowing that they are not peculiar to our conditions but similar to those with which our kinsmen across the seas and other nations have had to contend, we can with confidence appeal to their experience and be guided by their achievements. From them we can learn the vital difference between a "record system" such as ours and that which is truly a "registry system" such as obtains in Australia, Tasmania, New Zealand, British Columbia, Manitoba, Ontario, and England, under the name of the "Torrens System of Land Registration and Transfer." And if we hesitate to be taught by those who may be termed "foreigners," though of common ancestry and speech with us, we need not go beyond the folds of our own bright flag, but can turn to those who may be more intimately termed "bone of our bone and flesh of our flesh"—our brethren in the great states of Illinois, California, Massachusetts, Minnesota, Oregon, and Colorado. Nay, we can even take lessons from our sea-girt babes in the distant islands of Hawaii and the Philippine Archipelago. All these, with one accord, proclaim the merits of the Torrens System; and the chorus they raise will soon be swelled by the voices of other states and peoples. For already has preliminary legislative action been taken in Iowa, Michigan, Rhode Island, Virginia, Wisconsin, and Porto Rico; while the subject has been under discussion in the Bar Associations of Georgia, Kentucky, Maine, Missouri, New York, North Dakota, Pennsylvania, Tennessee, Texas, Washington, and your own state of West Virginia.

The limits of this paper do not permit any general exposition of the Torrens System. Suffice it to say that its objects are: to ascertain and clear titles by judicial proceedings *in rem* which shall be binding upon all the world; to register the titles so ascertained; and to require every subsequent transfer and every lien or proceeding that is designed to affect the same to be registered upon the original certificate, which never goes out of the clerk's office, and also upon the duplicate certificate which is given to the person or persons owning the lands or any interest therein. The result is that everything which can affect the title is plainly registered upon the certificates, and every one, whether lawyer or layman, can tell the true state of the title at any moment. Title passes only by registration; and this act is speedily, securely, and cheaply done.

No wiser saying flowed from the pen of the quaint and worthy Cervantes than that "the proof of the pudding is the eating." And we can point with complete satisfaction to the record of the Torrens System wherever it has been tried. Permit me to cite one paragraph from a letter written me on November 24, 1900, by Hon. J. O'Bourne, Register of Titles in Queensland: "This office," says he, "has now been in existence thirty-eight years, and the rapid increase of the work performed in it as shown by the statistics (copy of which for the year 1899 herewith) is a fair indication of the popularity of the system. The transactions since the establishment of the office number 1,397,910, and there has been only one instance of loss through an incorrect title having been issued."

This, as you will observe, amounts to practical perfection, since error only appears as an atom among the millions. If the law could always administer such homoeopathic doses, its patients might justify the maxim: "*de minimis lex non curat.*" Glance for a moment at the reverse of the picture, and recall the constant efforts made by Virginia and your own

state to give good titles to her grantees. However much we have failed, still it can be said that such has been the effort from the beginning. Read, for instance, the preamble to the act of May, 1779: "Whereas, the various and vague claims to unpatented lands under the former and present government * * * may produce tedious and infinite litigation and disputes, and in the meantime purchasers would be discouraged from taking up lands upon the terms lately prescribed by law * * and it is just and necessary, as well for the peace of individuals as for the public weal, that some certain rules should be established for settling and determining the rights to such lands * * to the end that subsequent purchasers and adventurers may be enabled to proceed with greater certainty and safety * * *"—and ask yourselves whether it is not even now "just and necessary, as well for the peace of individuals as for the public weal" that something should be done to the end that purchasers, who are yet "adventurers," may be "enabled to proceed with greater certainty and safety?" It will not do for us to rest content with a system of laws that was proved to be inefficient even when our lands were a drug on the market at two cents per acre.

Brethren of the bar, are you not conscious of the fact that our land laws are antiquated and unsuited to the demands of the age? Do you doubt that they prohibit the easy alienability of lands and thus depress the values of real estate? Do you not know that they operate as a bar to short loans, and thus deaden capital invested in them? Do you not know that these things prevent many persons from investing in lands, and bear with peculiar hardship upon that vast body of our citizens—the poor whose chief possession consists in a modest home for which they have made the great sacrifice of burying—positively burying—the labor of years? The fruits of toil should be capable of the fullest enjoyment and the most beneficial uses. A treasure won by strained nerves and tendons, or crystalized from the sweat of the brow—the homes of the poor, the hope of our country and the surest prop of freedom—should possess a ready market value and be a universal source of commercial credit. How different is the case under our present laws! You know that the poor man cannot afford to borrow on his home——if he does, it is with the curse of usury and at the sacrifice of his life's blood!

On a bright October day in the year 1785, our Minister to France was in the village of Fontainbleau. Far from his native land, doubtless sweet memories of his "Monticello" swept over him as he looked towards the mountains; and he determined to climb the highest peak. As he fared along the way he met a peasant woman who begged an alms, and when he bestowed upon her a small coin: "she burst into tears," said he, "of a gratitude which I could perceive was unfeigned because she was unable to utter a word." Contrasting the condition of the French peasants, unable to utter their homes and impoverished by heavy rents, with that of even the lowliest freeman of America, and describing the scene I have related to a friend in Virginia, he wrote: "The small land holders are the most precious part of a state."* The same thing is true to-day, and it is far more important than ever to encourage the building of homes by the poor instead of placing obstacles or allowing obstacles to remain in the way of such investments. In what does true greatness at the bar consist? Not in the amassing of great fees, nor even in the hoarding of great learning. Not simply in skilful practice and wise counsel, nor even in spotless integrity.

*(Writings of Thos. Jefferson, Vol. VII., p. 33.)

For we follow no trade, but are destined to be leaders in a noble profession wherein the noblest faculties are to be employed. We owe something to the majesty and perfection of the Law. Not only allegiance but grateful service is due our Sovereign Lady, and on bended knee we should offer the richest fruits of experience and intelligence. Thus may we be knighted, or perchance crowned in her courts, and receive the guerdon of our consecrated calling. Thomas Jefferson was great because he could think and act not only for himself and the present but for the blessing of the many and the greatness of the future. Born with the seeds of freedom in his breast, his mission was to imbed them in the bosom of the law, that they might not only spring to life in the hearts of living patriots, but might survive his day and generation and bear fruit in future ages. A similar duty is imposed upon us, and the call comes to each one of you to respond in a manner worthy of the traditions of the bar, worthy of your noble ancestry, and worthy of this century whose dawn should be but a faint gleam of the full splendor of its midday glory.

The Judge and How To Nominate Him.

C. M. Alderson, of the Charleston Bar.

No event in recent history has emphasized more the wide-reaching influence and importance of the judicial position than the recent decision in the Alaskan boundary question. When we consider that a large and important strip of territory along the Pacific coast, controlling the coast for hundreds of miles, and giving access to some of the most valuable gold fields, was claimed by Canada on the one hand and by the United States on the other, and that the question of ownership was referred to a tribunal of six learned and distinguished men, three of them appointed ex-parte as the representatives of the English Canadian contention, and the other three likewise appointed on behalf of the United States, we can perhaps in a measure appreciate the dignity and importance of a decision wherein so much is at stake. It has been said that in a hundred years of arbitration, no commissioner has ever had the courage to decide against his own country.

The President of the Alaskan Boundary Commission was Baron Alverstone, Lord Chief Justice of England, and he proved himself a jurist whose respect for the law was superior to his love of country. Perhaps the highest love of country is that which impartially respects its laws. This may seem like a rather strong statement, but in presiding as President of such commission the Chief Justice of England was acting in the capacity of a jurist. He was acting in a capacity wherein no favors should be shown, and wherein the law should be administered alike to friend and foe. It is very gratifying to know that in the comments of the English press upon the adverse decision of their own distinguished jurist, there is a strong current of confidence in Judge Alverstone, and a general feeling of acquiescence in the decision, springing from the confidence in his great ability and sense of righteousness.

How much easier it is for a defeated litigant to accept a decision taking away his property, when he feels that such a taking away is the act of the law, administered through a just and upright court.

In the treatment of this topic it is my purpose to consider the judge in something of a two-fold capacity. First, as a citizen, and second, as a lawyer. Let us examine briefly what manner of man is best prepared for judicial functions. He ought to be a superior man, both in his mental and moral equipment.

As a citizen we consider a man from the standpoint of his influence and standing in the community where he lives. We have reference not to the man alone, but we also take into consideration his relation with other men, and his life in the community where he lives, and his influence upon the people around and about him. The church, the state, and society in its broader sense, have much to do with the man considered as a citizen. In every community there are men who are looked upon as models of upright conduct, and whose views are sought to settle disputes between neighbor and neighbor. Such men are valuable citizens, and often serve as restraining graces upon the spheres of unscrupulous lawyers, if such there be.

This is the type of citizen who has the confidence and esteem of his community and the people generally, and, so far, is splendid material for the judiciary.

In addition to the foregoing traits, our citizen should be a well trained lawyer. A lawyer whose experience and ability are valuable to clients. In our own state we have, until the present year, been paying our judiciary such meager salaries that the office of judge has not been an inviting one from a pecuniary standpoint, and the only way in which we could properly fill the office has been by hunting up noble patriots who were willing to sacrifice their pecuniary emoluments in order that the public and the bar might have learned judges.

Thanks to the last legislature, better times are coming for our judges, and whilst the salaries are still inadequate, they do not involve quite so much sacrifice on the part of future judges. Of course, it is assumed that we shall still have the same patriotic feeling on the part of the bench in its work of serving the public, even though the money rewards be small. But then again, we have the sense of feeling that we are approaching a better appreciation of the onerous duties and responsibilities of the bench.

It is a laudable ambition on the part of any lawyer to serve his people as judge. In no other way can a lawyer so well impress upon the profession the influence of his personality, his learning, his logic, and his righteousness. When the memory of the great lawyer has faded away into tradition, the knowledge of the great judge, who lives in the law books and the reports, will spread with greater reverence with the passing years.

Let us suppose that John Marshall had never occupied the position of Chief Justice of the United States Supreme Court. How different then would be his name in American history, and especially in the history of the American bench. What Virginian does not feel a pride in the illustrious career of Marshall as the first judge of the land? What American lawyer does not revere the memory of John Marshall? We have accounts of the learning and eloquence of such lawyers as Rufus Choate, Daniel Webster, William Wirt, and many others, but we do not know them in the same sense that we know our Marshall, Cooley, and Storey. And the judges of the future will be called upon to decide the momentous questions growing out of labor unions and the combinations of capital.

There is no art whereby the ability or inability of mental faculties and judicial fitness may be determined on an avoirdupois scale, but the authority for obtaining an approximate idea should be vested in the most enlightened forum, and what forum can be looked to with more confidence than the bar for the selection of the best judicial material. In this connection I quote from Mr. Bryce, on the American Commonwealth, as follows:

"Lawyers have not only a professional dislike to the intrusting of the law to incapable hands, such as a skilled brick-lawyer has to seeing a wall badly laid, but they have a personal interest in getting a fairly competent man before whom to plead. It is no pleasure to them to have a judge who is so ignorant, or so weak, that a good argument is thrown away upon him, or that you can feel no confidence that the opinion given your client, or a point of law which you think clear, will be verified by the decision of the court."

In discussing the best method of nominating the judges it may not be inappropriate to consider briefly some history in reference thereto in our own country.

The fathers of the constitution guarded with most jealous precaution

the independence of the judiciary. In the convention of 1787 they affirmed the life tenure by unanimous vote. To quote Mr. Brice again: "They deemed the risk of the continuance in office of an incompetent judge a less evil than the subserviency of all judges to the legislature, which might flow from a tenure dependent on legislative will. The result has justified their expectations. The judges have shown themselves independent of Congress and party, yet the security of their position has rarely tempted them to breaches of judicial duty. Impeachment has been four times resorted to, once only against a Justice of the Supreme Court, and then unsuccessfully."

In the original thirteen colonies, the superior judges were appointed by the governors, except in Rhode Island and Connecticut. When the states formed their first constitutions in 1776, six of the states, Rhode Island, Connecticut, Virginia, South Carolina, New Jersey and North Carolina, vested the appointment in the legislature. Five, New York, Pennsylvania, Maryland, New Hampshire and Massachusetts, gave it to the governor with the consent of the council. Delaware vested it in the legislature and the president, and Georgia allowed the people to elect.

The history of this country shows that, between the war of 1812 with England and the war between the states in 1861, there was a high wave of democracy spreading over the land, swallowing up much of the appointive power, which was transformed into popular elections. During this period the new settlers from Europe and the older states flocked into the vast undeveloped and rich northwest and west and adopted the most extreme policy of democratic government. The extremes of one-man power in Europe were exchanged for the extremes of popular power in the new settlements. The settlers who left Europe for the Atlantic seaboard during the colonial days came as colonists owing allegiance to the mother country and the law of the old world was transplanted in the new. But not so with the pioneers who peopled the great northwest and were intoxicated with the air of independence and adventure. And they believe so much in popular elections that they want the ladies to help do the voting. Often when people escape from restraints they run riot with their liberties.

If we look at any large American city we can at once see that the large foreign element has played its part in spreading the democratic or popular wave. This general wave caught the new states as they came into the Union, and this accounts for the fact of popular elections in the great states of the northwest and west, and also the newer southern states adopting the practice of popular election of the judiciary. Whilst this popular wave was most perceptible in the newer states, it was sufficiently strong to make inroads on the thirteen original colonies and capture the great states of New York and Pennsylvania. The states which do not elect judges by popular election either belong to the thirteen colonies or are in close touch and sympathy with them. The older commonwealths have been less influenced by the rise of the democratic wave, and in Rhode Island, Vermont, Virginia and South Carolina the judges are still elected by the legislature. In Georgia the superior and county judges are elected by the legislature. In Massachusetts, Connecticut, New Hampshire, Delaware, Maine, New Jersey and Louisiana the judges are appointed by the governor, subject to the confirmation of the legislature. In the constitutions of New Hampshire, Massachusetts, Rhode Island and Delaware there are provisions for the life tenure of the judges.

By having the judges nominated by the bar, they would not be plastered over with mortgages to politicians, and they would feel and know that

their tenure of office depended upon the confidence and esteem of the bar, and the ability and impartiality of the bench would be best subserved by absolute freedom from obligations to anybody other than the bar and the judicial sense of duty.

This would involve the responsibility of the bar to the public for the proper men for judicial positions, and it would help the bar in maintaining a high standard and fully meeting all the requirements of such responsibility. Without any constitutional changes the judges could be nominated by the bar (with the consent of the politicians) and then elected by the people; but, in the event of a constitutional change, my idea would be to have the judges nominated by the bar and commissioned by the governor, and in this way both the governor and the bar would be responsible for the character of the judiciary. My information is that, by common consent, the bar has in some instances nominated judges in New York, Ohio and Pennsylvania with good results.

Whilst it is not the purpose of this paper to advocate a life tenure for the state judiciary, I nevertheless feel constrained to say something in reference thereto. With low salaries, short terms and popular elections we have three strong influences tending to keep the most experienced lawyers from accepting judicial positions. Lawyers who enjoy a lucrative practice are reluctant to give it up for a position paying perhaps one-third or one-fourth as much as their fees. And then, at the end of the term, if he does not stand well with the political wire-pullers, he must again resume his practice, and that at a time when he has gotten out of touch with his clients, and has been unable to save any material sum from the small salary paid him as judge.

Judges are human beings, composed of flesh and blood like most other mortals, and their nervous and physical systems are, to a large extent, influenced and controlled like other people. When they are placed in positions where they must, so to speak, trim their sails to the powers that be, they cannot have that freedom and independence that is absolutely necessary in the judiciary. When the judge is inducted into office his mental energies should be applied to the decision of cases involving the liberty and property of his people, the whole people, rather than open to the temptation of devising schemes to secure his re-election.

Hamilton, in the Federalist, says: "The standard of good behavior for the continuance in office of the judicial magistrate is certainly one of the most valuable of the modern improvements in the practice of government. In monarchy it is an excellent barrier to the despotism of the prince; in the republic it is a no less excellent barrier to the encroachments and oppressions of the representative body, and it is the best expedient which can be devised in any government to secure steady, upright and impartial administration of the laws." In this connection it is interesting to note Part 1, Article 29, of the Massachusetts constitution, as follows:

"It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws and administrations of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will permit. It is therefore not only the best policy, but for the security of the rights of the people, and every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by general laws."

Substantially the same provision is found in the constitution of New Hampshire.

In the December number of *The Bar* will be found an article by Justice Brewer, of the United States Supreme Court, advocating permanent tenure in office of the state judiciary. Permanent tenure in office would mean more dignity on the bench.

It has been observed by some lawyers that the tendency of litigants is to go into the United States court, rather than the state courts, owing to the fact that, speaking generally, the federal judges preside with more dignity and experience.

Control over a man's subsistance is virtually control over his will, and the judges ought not to be so placed that they must court the favor of any political element. Once a judge, always a judge during good behavior, and then lawyers could much better be persuaded to give up large fees and accept a position where they could impress their personality and legal learning upon the bar, without any sense of time-serving, and knowing no master save the majesty of the law.

Constitution and By-Laws.

1. The Association shall be known as "The West Virginia Bar Association."

OBJECT.

2. The Association is formed to advance the science of jurisprudence; to promote reform in the law; to facilitate the administration of justice; to uphold integrity, honor and courtesy in the legal profession; to encourage thorough liberal education, and to cultivate cordial intercourse among the members of the bar.

MEMBERSHIP.

3. The members of the legal profession attending this convention this 8th day of July, 1886, are hereby declared to be members of this Association, provided they shall, during this present session, pay the admission fee hereinafter mentioned.

Any member of the legal profession in West Virginia, of good standing, residing therein, may become a member of the Association upon nomination and vote, as hereinafter provided.

ELECTION OF MEMBERS.

4. All nominations for membership shall be made by the Committee on Admissions, and must be transmitted in writing to the President and by him reported to the Association, and the Association shall thereupon vote by ballot. Several nominees may be voted for upon the same ballot, and in such case, placing the word "no" against any name or names upon the ticket, shall be deemed a negative vote against such name or names, and against those only. One negative vote in every five shall suffice to defeat an election. No member of the bar residing in a county where there is a local Bar Association shall become a member of this Association unless he shall be a member of such local Association.

OFFICERS.

5. The officers of the Association shall be a President, who shall be ineligible to re-election on the expiration of his term; one Vice-President from each Congressional district represented by membership in the Association; a Secretary and Treasurer. All of these shall be elected at the annual meeting and hold their offices until the next annual meeting of the Association and until their successors are elected. A majority of votes shall be necessary to the election of officers, including the election of the Executive Council. Such election shall be by ballot.

COMMITTEES.

6. At the annual meetings the Association shall elect an Executive Council, to be composed of five members and the President and Secretary.

The President shall, with the approval of the Executive Council, appoint the following standing committees, to-wit:

A Committee on Admissions.

A Committee on Judicial Administration and Legal Reform.

A Committee on Legal Education.

A Committee on Grievances.

A Committee on Legal Biography.

A majority of the members of every committee who may be present at

a meeting of the Association shall constitute a quorum of such committee, for the purpose of such meeting.

Every committee shall, at each annual meeting, report in writing a summary of its proceedings since the last annual report, together with any suggestions deemed suitable, and appertaining to its powers, duties or business. A general summary of all such annual reports, and the proceedings of the meetings, shall be prepared and printed by and under the direction of the Executive Council, together with the constitution, by-laws, names and residences of officers, standing committees and members of the Association, as soon as practicable after each annual meeting.

FINAL ACTION.

7. No action of this Association of a permanent nature or recommending changes in law or the administration of justice, shall be had until the subject-matter thereof shall have been reported upon by the appropriate committee to which the same shall have been referred, unless this regulation shall be suspended by a two-thirds vote of the members voting thereon.

PRESIDENT.

8. The President, or in his absence the Vice-President, senior in years, shall preside at all meetings of the Association, and the President shall deliver an address at the opening of the annual meeting after his election.

THE EXECUTIVE COUNCIL.

9. This Council shall manage the affairs of the Association, subject to the provisions of the constitution and by-laws, and shall be vested with the title to all its property, as trustees thereof, and shall make by-laws for the Association, subject to amendment by the Association.

COMMITTEE ON ADMISSIONS.

10. The proceedings of this committee shall be deemed confidential and shall be kept secret, except so far as written reports of the committee shall be necessarily and officially made to the Association.

COMMITTEE ON JUDICIAL ADMINISTRATION AND LEGAL REFORM.

11. It shall be the duty of the Committee on Judicial Administration and Legal Reform to take notice of all proposed changes in the law, and to recommend such as may be in their opinion entitled to the favorable influence of the Association; and, further, to observe the working of the judicial system of the state, to collect information with reference thereto, and to recommend such action as they may deem advisable.

COMMITTEE ON LEGAL EDUCATION.

12. It shall be the duty of the Committee on Legal Education to examine and report upon any proposed changes in the system of legal education and of admission to the practice of the profession in the state of West Virginia.

COMMITTEE ON GRIEVANCES.

13. The Committee on Grievances shall receive all complaints which may be made in matters affecting the interests of the legal profession, the practice of the law and administration of justice, and report the same to the Association with such recommendations as they may deem advisable.

The proceedings of this committee shall be deemed confidential and kept secret, except so far as reports of the same shall be necessarily and officially made to the Association.

COMMITTEE ON LEGAL BIOGRAPHY.

14. The Committee on Legal Biography shall provide for the preservation among the archives of this Association of suitable written or printed memorials of the lives and characters of the deceased members of the West Virginia Bar.

SECRETARY.

15. The Secretary shall keep a record and conduct the correspondence of the Association and perform the usual duties of such office.

TREASURER.

16. The Treasurer shall collect, and by order of the Executive Council disburse, all funds of the Association, and keep regular accounts, which at all times shall be open to the inspection of any member or members of the Executive Council.

ANNUAL MEETING.

17. This Association shall meet annually at Parkersburg or such other place and at such time as shall be fixed at each session of the Association. It shall be the duty of the Secretary to mail to each member a written or printed notice of the time and place of each annual or special meeting at least four weeks in advance of each meeting. Those present at such a meeting shall constitute a quorum.

DUES.

18. The fee for admission to membership shall be $5, which shall in all cases accompany the application for membership. The annual dues shall be $4, the payment of which shall entitle each member to receive one copy of the journal and all the regular publications free of charge. The Treasurer shall annually set apart and pay over to the Executive Council one-fourth of the sum collected as annual dues, which shall be used as a fund for paying the expenses of publishing the journal of the Association.

AMENDMENTS.

19. This constitution may be altered or amended at any annual meeting, on the recommendation of the Executive Council, by a vote of the majority of the members present, or without such recommendation by a vote of two-thirds of the members present.

EXPULSION.

20. Any member may be expelled by a majority of this Association at any annual meeting.

RESIGNATIONS.

21. Any member may resign at any time upon the payment of all dues for the current year in which the resignation is tendered; provided, there be no charges for misconduct against such member.

From the date of the receipt by the Secretary of a notice of resignation, with an endorsement thereon by the Treasurer that all dues have been paid, as above provided, the person giving such notice shall cease to be a member of the Association.

By-Laws.

1. The Executive Council, at its first meeting after each annual meeting of the Association, shall select some person to make an address at the next annual meeting, on the life and service of any deceased members of the bench or bar of West Virginia of eminence, or other subjects; and also not exceeding five members of the Association to read papers.

2. The order of business at the annual meeting shall be as follows:

a. Annual address of the President.
b. Report of Committee on Admissions and election of members.
c. Report of the Secretary.
d. Report of the Treasurer.
e. Reports of Standing Committees:
Executive Council.
On Judicial Administration and Legal Reform.
On Grievances.
On Legal Biography.
f. Reports of Special Committees.
g. The Nomination or Officers.
h. The Appointment of Standing Committees.
i. Miscellaneous Business.
j. The Election of Officers.

The address to be delivered by a person invited by the Executive Council, shall be at the morning session of the second day of the annual meeting, and the reading of papers by the members appointed by the Executive Council shall be on the same day, unless the Executive Council shall designate some other time for the address and reading of papers. After the reading of each paper, an opportunity shall be given for discussion on the topic of the paper.

The Executive Council shall publish at least four weeks in advance of each annual meeting a statement of the name of the person who is to deliver the annual address, and the names of those who are to read papers, and the subject of each; and the Secretary shall forthwith transmit a copy to each member.

3. No person taking part in a discussion shall speak more than ten minutes at a time nor more than twice on one subject.

A stenographer shall be employed at each annual meeting.

4. At any of the meetings of the Association, members of the bar of any foreign country or of any state other than West Virginia, who are not members of the Association, may be admitted to the privilege of the floor during such meeting.

5. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the report of committees and all proceedings of the annual meetings shall be printed; but no other address made or papers read or presented shall be printed, except by order of the Executive Council. Extra copies of reports, addresses, and papers read before the Association may be printed for the use of their authors, not

exceeding one hundred copies to each of such authors. The Executive Council, as a committee on publication, shall meet within one month after each annual meeting, at such time and place as the chairman shall appoint.

6. The term of office of all others, including the Executive Council, elected at an annual meeting, shall commence at the adjournment of such meeting; but the term of office of the members of the several committees appointed by the President shall commence immediately upon their appointment.

7. Each committee shall elect its officers, whose term of office shall commence on their election and continue until the appointment of a new committee; and each standing committee shall continue until its successor shall be appointed.

8. All standing committees shall meet on the day preceding each annual meeting at the place where the same is to be held, at such hour as the respective chairmen shall designate.

9. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint. Reasonable notice shall be given by him to each member by mail.

10. The Treasurer's report shall be examined and audited annually, before its presentation to the Association, by two members to be appointed by the chairman of the Executive Council.

11. No resolution complimentary to an officer or member for any service performed, paper read or address delivered shall be considered by the Association.

12. Any charges of unprofessional conduct against any member of the Association, if made in writing and signed by the person preferring them, shall be investigated by the Committee on Grievances, who shall recommend to the Association such action as they may deem proper, but no action shall be taken by said committee or this Association without due notice to and the service of the charges upon the accused.

Code of Ethics.

Adopted by the West Virginia Bar Association, February 12, 1902.

The purity and efficiency of judicial administration, which under our system is largely governmental itself, depends as much upon the character, conduct and demeanor of attorneys in their great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries.

"There is perhaps no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity, in which so many and difficult questions of duty are constantly arising. There are pit-falls and man-traps at every step, and the mere youth at the very outset of his career needs often the prudence of self-denial as well as the moral courage which belong commonly to riper years. High moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."—*Sharswood.*

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by the analogy to the duties enjoined by statute and the rules of good neighborhood.

The following General Rules are adopted by the Bar Association of the State of West Virginia for the guidance of its members:

DUTY OF ATTORNEYS TO COURT AND JUDICIAL OFFICERS.

1. The respect enjoined by law for courts and judicial officers is exacted for the sake of the office and not for the individual who administers it. Bad opinion of the incumbent, however well founded, cannot excuse the withholding of the respect due to the office while administering its functions.

2. The proprieties of the judicial station, in a great measure, disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of the judge is necessarily involved in determining his removal from or continuance in office.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due to the judge's station, is the only just foundation for cordial, personal and official relations between Bench and Bar. All attempts by

means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or reading a repealed statute as in existence; knowingly misquoting the language of a decision or a text-book; knowingly mis-stating the contents of a paper, the testimony of a witness, or the language or arguments of the opposite counsel; offering evidence which it is known the court must reject as illegal, to get it before the jury under the guise of arguing its admissibility, and all kindred practices, are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening arguments positions intended finally to be relied on, in order that the opposite counsel may not discuss them, is unprofessional.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side bar" remarks and sparring discourse to influence the jury or bystanders. Personal colloquies between counsel tend to delay and promote unseemly wrangling, and ought to be discouraged.

6. Attorneys owe it to the courts and the public whose business the courts transact, as well as to their own clients, to be punctual in attendance on their causes; and whenever an attorney is late he should apologize or explain his absence.

7. One side must always lose the cause, and it is not wise or respectful to the court for attorneys to display temper because of an adverse ruling.

DUTIES OF ATTORNEYS TO EACH OTHER, TO CLIENTS AND TO THE PUBLIC.

8. An attorney should strive at all times to uphold the honor, maintain the dignity and promote the usefulness of the profession, for it is so interwoven with the administration of justice that whatever redounds to the good of one advances the other, and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the state and his fellow-man.

9. An attorney should not speak slightly or disparagingly of his profession, or pander in any way to the popular prejudices against it; and he should scrupulously refrain at all times and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

10. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability," to the end that nothing may be taken or with-

held from him save by the rules of law legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or lesson the duty of obedience to law and the obligation to his neighbor; and it does not permit, much less demand, violation of law or any manner of fraud or chicanery for the client's sake.

11. Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.

12. An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, forswears himself. The state's attorney is criminal if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle prosequi*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

13. An attorney cannot reject the defense of a person accused of a criminal offense because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defenses as the law of the land permits, to the end that no one may be deprived of his life or liberty but by due process of law.

14. An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harrass or injure the opposite party, or to work oppression and wrong.

15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

16. Newspaper advertisements, circulars and business cards, tendering professional services to the general public, are proper, but special solicitation of particular individuals to become clients is disreputable. Indirect advertisements for business, by furnishing or inspiring editorals or press notices regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation is of evil tendency and wholly unprofessional.

17. Newspaper publications by an attorney as to the merits of pending or anticipated litigation call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications, and when proper it is unprofessional to make them anonymously.

18. When an attorney is witness for his client, except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client as to any matter.

19. Assertions, sometimes made by counsel in argument, of a personal belief of the client's innocence or the justice of his cause, are to be discouraged.

20. It is indecent to hunt up defects in titles, and the like, and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate

about it. Except where ties of blood, relationship or trust make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit. Stirring up strife and litigation is forbidden by law and disreputable in morals.

21. Communications and confidence between clients and attorneys are the property and secrets of the client, and cannot be divulged except at his instance; even the death of his client does not absolve the attorney from his obligation of secrecy.

22. The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the client's interest in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material in a subsequent suit, as a basis of any judgment which may injuriously affect his rights, the attorney can not appear in such cause without the consent of his former client.

23. An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere scrivener, and was not consulted as to the facts, and, unknown to him, the transaction amounted to a violation of the law, he may assail it on that ground, in suits between third persons or between parties to the instrument and strangers.

24. An attorney, openly and in his true character, may render purely professional services before committees regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason or understanding, to influence action.

25. An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all concerned, with full knowledge of the facts. Even then, such opposition is embarrassing and ought to be avoided. An attorney represents conflicting interests, within the meaning of the rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

26. "It is not desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified."

27. An attorney is under no obligation to minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client can not be made the keeper of an attorney's conscience in professional matters. He can not demand as of right that his attorney shall abuse the opposite party, or indulge in offensive personalities. The attorney, under the solemnity of his oath, must determine for himself whether such a course is essential to the ends of justice, and therefore justifiable.

28. Clients, and not their attorneys, are the litigants, and whatever may be the ill feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

29. In the conduct of litigation and the trial of causes, the attorneys should try the merits of the cause, and not try each other. It is not proper

to allude to, or comment upon, the personal history or mental or physical peculiarities or idiosyncrasies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories and the like, the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.

31. The miscarriage to which justice is subject and the uncertainty of predicting results admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

32. Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

33. An attorney is in honor bound to disclose to the client at the time of retainer all the circumstances of his relation to the parties, or interest or connection with the controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite parties will hinder or seriously embarrass the full and fearless discharge of all his duties.

34. An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.

35. Money or other trust property coming into the possession of the attorney should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

36. Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject-matter of the litigation, so long as the relation of attorney and client continues.

37. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but, after advising frankly with the client, it should be left to his determination.

38. Important agreements affecting the rights of clients should, as far as possible, be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of court.

39. Attorneys should not ignore known customs of practice of the bar of a particular court, even when the law permits, without giving opposing counsel timely notice.

40. An attorney should not attempt to compromise with the opposite party without notifying his attorney if practicable.

41. When attorneys jointly associated in a cause can not agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively, in which event it is his duty to ask to be discharged.

42. An attorney ought not to engage in discussion or argument about the merits of the case with the opposite party without notice to his attorney.

43. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset as to the amount of the attorney's compensation, and, where it is possible, this should always be agreed on in advance.

44. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a lawsuit to justify it, which ought always to be avoided except as a last resort to prevent imposition and fraud.

45. In fixing fees the following elements should be considered—1st, The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause. 2nd, Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed, and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d, The customary charges of the bar for similar services. 4th, The real amount involved and the benefit resulting from the service. 5th, Whether the compensation was contingent or assured. 6th, Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

46. Contingent fees may be contracted for, but they lead to many abuses, and certain compensation is to be preferred.

47. Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge, in most instances, and where the circumstances make it proper to charge, the fees should generally be less than in case of other clients.

48. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without vilification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness's testimony, and often rob deserved strictures of proper weight.

49. It is the duty of the court and its officers to provide for the comfort of the jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue or hunger, the uncomfortableness of their seats or the court room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court, whereby there will

be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury toward the court or opposite counsel if such requests are denied. For like reasons one attorney should never ask another in the presence of the jury to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws. And all propositions from counsel to dispense with argument should be made and discussed out of the hearing of the jury.

50. An attorney ought never to converse privately with jurors about the case, and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color for imputing evil designs, and often leads to scandal in the administration of justice.

51. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause, and should always be a friend to the defenseless and oppressed.

Roll of Members of the West Virginia Bar Association.

Addelman, R. M.....Wheeling.
Alderson, Charles M.....Charleston.
Alderson, John D.....Summersville.
Allen, G. R. C.....Wheeling.
Allen, W. S.....St. Marys.
Allison, B. S.....Wheeling.
Altizer, R. G.....Clarksburg.
Ambler, B. M.....Parkersburg.
Ambler, M. G.....Parkersburg.
Arbenz, John P.....Wheeling.
Archer, V. B.....Parkersburg.
Arnett, U. N.....Fairmont.
Ashby, W. L.....Charleston.
Atkinson, G. W.....Charleston.
Avis, S. B.....Charleston.
Ayers, B. F.....Harrisville.

Bailey, Benj. F.....Grafton.
Baker, George C.....Morgantown.
Bambrick, G. L.....New Cumberland.
Barrett, Thos. F.....Parkersburg.
Barron, J. F.....St. Marys.
Bassel, John.....Clarksburg.
Bayer, Harry W.....Berkeley Springs.
Beard, Wm.....Parkersburg.
Bennett, J. B.....Weston.
Bennett, W. G.....Weston.
Blackmarr, F. L.....Sistersville.
Blair, J. V.....West Union.
Blizzard, Reese.....Parkersburg.
Bowers, Basil T.....New Martinsville.
Boyd, George E.....Wheeling.
Brannon, W. W.....Weston.

Bratton, W. A.....Mannington.
Brooke, St. George T.....Morgantown.
Broun, Thomas L.....Charleston.
Brown, C. L.....Ravenswood.
Brown, Forrest W.....Charles Town.
Brown, J. F.....Charleston.
Brown, T. A.....Elizabeth, Wirt Co.
Brown, Wm. G., Jr.....Kingwood.
Brown, W. R.....West Union.
Bullock, T. O.....Parkersburg.
Burdette, A. W.....Grafton.
Burdette, S. C.....Parkersburg.
Burlew, B. L.....Charleston.
Butcher, B. L.....Fairmont.
Byrer, Harry H.....Philippi.

Caldwell, Alfred.....Wheeling.
Caldwell, George B.....Wheeling.
Caldwell, J. Melton.....Parkersburg.
Caldwell, Wm. G.....Wheeling.
Camden, H. P.....Parkersburg.
Campbell, A. N.....Union.
Campbell, John A.....New Cumberland.
Campbell, Oscar A.....Morgantown.
Carmichael, Randolph T.....Charleston.
Chambers, O. J.....Spencer.
Chilton, W. E.....Charleston.
Clark, F. W.....New Martinsville.
Clark, R. L.....Union.
Clarke, A. J.....Wheeling.
Clayton, W. C.....Keyser.
Conley, W. G.....Parsons.
Coniff, John J.....Wheeling.
Copper, John T.....Parkersburg.
Cornett, T. C.....New Martinsville.
Cornwell, John J.....Romney.
Cornwell, W. B.....Romney.
Cowden, W. J. W.....Wheeling.
Cox, Frank C.....Wheeling.
Cox, Frank.....Morgantown.
Cramer, C. W.....Morgantown.

Crile, L. C.....Clarksburg.
Crogan, P. J.....Kingwood.
Cunningham, A. M.....Parsons.
Cutwright, W. B.....Buckhannon.

Dailey, Benjamin.....Moorefield.
Dailey, C. W.....Keyser.
Dailey, R. W.....Romney.
Davis, John J.....Clarksburg.
Davis, John W.....Clarksburg.
Dawson, Wm. M. O.....Charleston.
Dayton, A. G.....Philippi.
Dent, M. H.....Grafton.
Dent, W. R. D.....Grafton.
Dice, Charles S.....Lewisburg.
Dillon, C. W.....Fayetteville.
Donehoo, John R.....Fairview.
Doolittle, Edward S.....Huntington.
Dorr, C. P.....Addison.
Douglass, W. S.....Clarksburg.
Dovener, B. B.....Wheeling.
Drane, Henry K.....Piedmont.

Edmiston, Andrew.....Weston.
Emmert, H. H.....Martinsburg.
Enslow, F. B.....Huntington.
Evans, D. B.....Moundsville.
Ewing, J. Alex.....Moundsville.
Ewing, James W.....Wheeling.

Fast, R. E.....Morgantown.
Faulkner, C. J.....Martinsburg.
Faulkner, E. Boyd.....Martinsburg.
Fickeison, A. G.....Wheeling.
Fisher, Jacob.....Sutton.
Fleming, G. M.....Buckhannon.
Flick, C. P.....Wheeling.
Flick, W. H. H.....Martinsburg.
Flournoy, S. L.....Charleston.
Fortney, Neil J.....Kingwood.
Frazer, James C.....Morgantown.
Freer, Romeo H.....Harrisville.

Gaines, J. H.....Charleston.
Garvin, T. M.....Wheeling.
George, W. T.....Philippi.
Gerhardt, L. D.....Martinsburg.
Gibson, Braxton D.....Charles Town.
Gilchrist, George R. E.....Wheeling.
Gilkeson, H. B.....Romney.
Glasscock, S. F.....Morgantown.
Glasscock, Wm. E.....Morgantown.
Gore, C. W.....Clarksburg.
Greene, S. S.....Charleston.
Guard, Chas. P.....Grafton.

Hall, Grant P.....Charleston.
Hall, S. B.....New Martinsville.
Hall, Wm. McG.....New Martinsville.
Hamill, Jas. L.....Welch.
Hamilton, J. M.....Grantsville.
Handlan, J. B.....Wheeling.
Hardman, O. W. O.....Middlebourne.
Harmer, Harvey W.....Clarksburg.
Hart, E. A.....New Cumberland.
Haymond, Wm. E.....Sutton.
Hearne, Wm. H.....Wheeling.
Hedges, M. S.....Keyser.
Henritze, T. L.....Welch.
Herndon, I. C.....Welch.
Hervey, Henry C.....Wellsburg.
Heyer, J. B.....Madison.
Higginbotham, C. C.....Buckhannon.
Hodges, M. S.....Keyser.
Hogg, Chas. Edgar.....Point Pleasant.
Hoke, J. T.....Windsor, Nova Scotia.
Holliday, O. L.....Moundsville.
Holt, J. Howard.....Moundsville.
Holt, John H.....Grafton.
Hood, O. A.....Bayard.
Houston, H. T.....Clarksburg.
Howard, A. R.....Point Pleasant.
Howard, John A.....Wheeling.
Hubbard, Nelson C.....Wheeling.

Hubbard, W. P. ..... Wheeling.
Hunt, A. B..... Sistersville.

Iams, Frank V..... New Martinsville.
Ice, W. T., Jr..... Philippi.
Ireland, A. D..... Parkersburg.
Isbell, L. D..... Huntington.

Jackson, Malcolm..... Charleston.
Jackson, Wm. W..... Parkersburg.
Jacobs, T. P..... New Martinsville.
Jeffords, Tracy L..... Harper's Ferry.
(Office Columbian Building, Washington, D. C.)
Johnson, Chas. B..... Clarksburg.
Johnson, Clyde B..... St. Marys.
Johnson, George W..... Parkersburg.
Johnson, James S..... Parkersburg.
Johnson, Okey..... Morgantown.

Keller, B. F..... Bramwell.
Kenney, A. E..... Charleston.
Kilmer, W. C..... Martinsburg.
Kingsley, E. R..... Parkersburg.
Knight, E. W..... Charleston.
Koontz, J. K..... Ansted.
Kramer, C. W..... Piedmont.
Kunst, G. H. A..... Grafton.

LaFollette, L. M..... Charleston.
Laird, J. F..... Parkersburg.
Law, James E..... Clarksburg.
Layman, Jokn L..... Fairmont.
Leftwick, F. C..... Madison.
Lehman, A. L..... Fairmont.
Leonard, Dan B..... Parkersburg.
Lindsay, Ward B..... Martinsburg.
Logan, J. D..... Union.
Lucas, D. B..... Charles Town.
Lynch, C. W..... Clarksburg.

MacMahon, Frank A..... Wheeling.
Marshall, O. S..... New Cumberland.

Martin, Clarence E. ..... Martinsburg.
Martin, F. T. ..... Fairmont.
Mason, John W. ..... Fairmont.
Matheny, C. W. ..... St. Marys.
Mathews, D. E. ..... Huntington.
Mathews, W. B. ..... Charleston.
Mathews, W. G. ..... Charleston.
Maxwell, Haymond. ..... Clarksburg.
May, Clark W ..... Hamlin.
Meighen, B. F. ..... Moundsville.
Melvin, Thayer ..... Wheeling.
Menager, James B. ..... Point Pleasant.
Merrick, C. W. ..... Parkersburg.
Meyer, W. C. ..... Wheeling.
Miller, J. H ..... Hinton.
Miller, W. N. ..... Parkersburg.
Moats, Frank P. ..... Parkersburg.
Mollohan, W ..... Charleston.
Moore, Charles W. ..... Clarksburg.
Moore, Sheridan ..... Wheeling.
Moreland, Joseph ..... Morgantown.
Morris, C. E. ..... Wheeling.
Morris, Presley W. ..... Parkersburg.
Morton, E. H. ..... Addison.
Moss, Hunter H ..... Parkersburg.
Murphy, C. M. ..... Philippi.
McCammick, Chas. ..... Moundsville.
McClintic, G. W. ..... Charleston.
McClintic, L. M. ..... Marlinton.
McCluer, James S. ..... Parkersburg.
McCrum, A. Bliss. ..... Kingwood.
McDonald, Angus W. ..... Charles Town.
McDonald, Wm. ..... Keyser.
McGary, W. B. ..... Weston.
McGraw, John T. ..... Grafton.
McKenzie, J. E. ..... New Cumberland.
McMahon, Richard R. ..... Harper's Ferry.
McNeal, N. C. ..... Marlinton.
McPeak, E. M. ..... Fayetteville.
McWhorter, H. C. ..... Charleston.
McWhorter, J. C. ..... Buckhannon.
McWhorter, J. M. ..... Lewisburg.

Nadenbousch, A. C. ..... Martinsburg.
Naylor, Joseph R. ..... Wheeling.
Nesbitt, Frank W. ..... Wheeling.
Noll, Allen B. ..... Martinsburg.
Northcott, R. S. ..... Clarksburg.
Nuckolls, E. L. ..... Fayetteville.

Oldfield, J. A. ..... St. Marys.
Ostenton, Chas. W. ..... Montgomery.

Palmer, John C., Jr. ..... Wellsburg.
Patton, A. G. ..... Parkersburg.
Payne, W. Dallas ..... Charleston.
Pendleton, Walter ..... Spencer.
Peterkin, Wm. G ..... Parkersburg.
Pifer, Felix C. ..... Buckhannon.
Poffenbarger, Geo. C. ..... Point Pleasant.
Poole, X. ..... Martinsburg.
Post, Melville D. ..... Grafton.
Poundstone, A. M. ..... Buckhannon.
Preston, A. D. ..... Fayetteville.
Preston, John A ..... Lewisburg.
Price, George E. ..... Charleston.
Prickett, N. C. ..... Ravenswood.
Profitt, J. L. ..... Parkersburg.

Quarrier, R. A. ..... Charleston.

Reay, D. C ..... Morgantown.
Reed, T. N ..... Hinton.
Reymann, Lawrence A ..... Wheeling.
Reynolds, F. M. ..... Keyser.
Richards, H. C. ..... Wheeling.
Riley, T. S. ..... Wheeling.
Robinson, E. L ..... New Martinsville.
Robinson, Ira E. ..... Grafton.
Rucker, E. P ..... Welch.
Rucker, H. Scott. ..... Huntersville.
Russell, H. M. ..... Wheeling.

Sawtelle, A. L ..... Wheeling.
Scott, W. ..... Clarksburg.

Sheppard, J. A.....Williamson.
Showalter, E M.....Fairmont.
Simms, H. C.....Huntington.
Simpson, J. Coleman.....Moundsville.
Smith, Charles A.....Parkersburg.
Smith, E. G.....Clarksburg.
Smith, Harvey F.....Clarksburg.
Smith, Leven.....Parkersburg.
Smith, S. G.....Wheeling.
Smith, Wm. F.....Sistersville.
Snider, Millard F.....Clarksburg.
Spencer, J. F.....Point Pleasant.
Sperry, M. G.....Clarksburg.
St. Clair, J. G.....Grafton.
Staples, Walter.....Sistersville.
Steiley, C. O.....Davis.
Stewart, Edgar B.....Morgantown.
Stifel, L. F.....Wheeling.
Stiles, M. F.....Charleston.
Stokes, W. H.....Welch.
Stout, W. Frank.....Clarksburg.
Strader, J. F.....Beverly.
Strauss, W. M.....Parkersburg.
Strickling, Jas. H.....Middlebourne.
Strieby, C. O.....Davis.
Sturgiss, Geo. C.....Morgantown.
Summerville, J. B.....Wheeling.
Swiger, John R.....Clarksburg.

Talbott, E. D.....Elkins.
Taylor, Blaine W.....Elkins.
Teter, C. F.....Philippi.
Thompson, M. M.....Clarksburg.
Thompson, W. R.....Huntington.
Thurmond, H. C.....Addison.
Turner, S. D.....Parkersburg.

Valantine, A. J.....Parsons.
Vandale, J. A. A.....Spencer.
Vandevort, J. W.....Parkersburg.
Van Sickles, H. L.....Lewisburg.

Van Winkle, W. W.....Parkersburg.
Vinson, Z. T.....Huntington.

Walker, Stewart W.....Martinsburg.
Watts, C. C.....Charleston.
Wehrle, John.....Charleston.
Wells, Ross.....St. Marys.
Westenhaver, D. C.....Martinsburg.
White, Robert.....Wheeling.
White, W. J.....Morgantown.
Wiley, W. S.....New Martinsville.
Wilgus, T. B.....Morgantown.
Willey, Chauncey A.....Morgantown.
Willey, W. P.....Morgantown.
Williams, Homer W.....Clarksburg.
Williams, L. J.....Lewisburg.
Willis, M. H.....West Union.
Wilson, E. W.....Charleston.
Wilson, J. R.....Hamlin.
Wilson, W. G.....Elkins.
Wingerter, Ferdinand.....Wheeling.
Wolfe, W. H., Jr.....Parkersburg.
Wooddell, W. L.....Wheeling.
Woods, H. B.....Harrisville.
Woods, J. Hop.....Philippi.
Woods, J. M.....Martinsburg.
Woods, Samuel V.....Philippi.
Worley, W. G.....Kingwood.
Wotring, D. M.....Kingwood.
Wysong, W. S.....Addison.

Young, U. G.....Buckhannon.

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